Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

BETTY SPAHN, Sister and Guardian of Edna M. Folz,
Petitioner,

v.

MARK WITTMAN, Guardian ad Litem for Edna M. Folz,
Respondent.

Petition for Writ of Certiorari to the Wisconsin Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Edna Folz is a 73 year-old woman suffering through the end stages of very advanced Alzheimer's dementia. She is bedridden in a fetal position; incontinent of bowel and bladder; unable to eat, move, or even follow simple commands; and she is without prospect for improvement. She is kept alive by a surgically implanted gastrostomy tube that artificially provides her with fluid and nutrition. Edna's health care providers, her guardian ad litem, and her family members supported her legal guardian's good faith determination that treatment termination would be in Edna's best interests. Yet, the Wisconsin Supreme Court held that Betty Spahn, Edna's sister and legal guardian, may not authorize withdrawal of Edna's treatment, under the following rule: "If that person is not in a persistent vegetative state, this court has determined that, as a matter of law, it is not in the best interests of the ward to withdraw life-sustaining treatment, including a feeding tube, unless the ward has executed an advance directive or other statement clearly indicating his or her desires." The question presented is:

Whether, consistent with equal protection of the law and liberty interests under the Fourteenth Amendment to the U S. Constitution, a state may *allow* guardians to authorize withdrawal of life-sustaining treatment from incompetent persons in a persistent vegetative state regardless of whether the incompetent has executed a clear prior treatment directive, but *prohibit* guardians from exercising this liberty interest on behalf of all other incompetent persons unless the incompetent has executed a clear prior treatment directive.

LIST OF PARTIES

In addition to the parties listed in the caption of the case, the following are additional parties:

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The Supreme Court of Wisconsin appointed Attorney Howard B. Eisenberg as Respondent-Designate to appear and provide briefing to the Court in support of the decision of the Circuit Court of Wood County, Wisconsin.

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Ms. Folz is the incompetent for whom the petitioner is guardian.

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OPINIONS BELOW

The opinion of the Wisconsin Supreme Court (Appen. *infra*, 1a-34a) is reported at 210 Wis. 2d 558, 563 N.W.2d 485 (1997). This matter was heard by the Wisconsin Supreme Court on bypass from the circuit court. Accordingly, there is no appellate court opinion. The opinion of the Wood County Circuit Court is not reported. However, the Memorandum Decision and Order of the Wood County Circuit Court are reprinted in the Appendix *infra* (Appen. 42a-44a and 40a-41a, respectively).

JURISDICTION

On April 17, 1995, the Wood County Circuit Court issued its Memorandum Decision and ruled that it would not confirm Edna M. Folz's guardian's decision to withdraw artificial nutrition from her ward. Appen. *infra* 42a-44a. On August 22, 1995, the Wood County Circuit Court entered its Order confirming its Memorandum Decision. Appen. *infra* 40a-41a. On April 16, 1997, the Wisconsin Supreme Court granted a petition to bypass the Wisconsin Court of Appeals. Appen. *infra* 37a. On June 12, 1997, the Wisconsin Supreme Court affirmed the opinion of the Wood County Circuit Court. Appen. *infra* 1a-34a. Throughout these proceedings, petitioner asserted, *inter alia*, that Edna Folz has a liberty interest under the Due Process Clause of the United States Constitution to be free from unwanted medical treatment and that to deny her guardian the ability to relieve Edna Folz from the provision of artificial nutrition because Edna Folz is not in a persistent vegetative state, while permitting guardians of persistently vegetative incompetents to do so, violates the United States Constitution. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides in pertinent part:

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV, SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MD. CODE ANN. § 5-601 HEALTH-GENERAL

Maryland Code Annotated Section 5-601 provides in pertinent part:

Definitions. * * * *

(c) Best interest.—"Best interest" means that the benefits to the individual resulting from a treatment outweigh the burdens to the individual resulting from that treatment, taking into account:

(1) The effect of the treatment on the physical, emotional, and cognitive functions of the individual;

(2) The degree of physical pain or discomfort caused to the individual by the treatment, the withholding or withdrawal of the treatment;

(3) The degree to which the individual's medical condition, the treatment, or the withholding or withdrawal of treatment result in a severe and continuing impairment of the dignity of the individual by subjecting the individual to the condition of extreme humiliation and dependency;

(4) The effect of the treatment on the life expectancy of the individual;

(5) The prognosis of the individual for recovery, with and without the treatment;

(6) The risks, side effects, and benefits of the treatment or withholding or withdrawal of the treatment; and

(7) The religious beliefs and basic values of the individual receiving treatment, to the extent these may assist the decision maker in determining best interest.

MD. CODE ANN. § 5-605
SURROGATE DECISION MAKING

Maryland Code Annotated section 5-605 provides in pertinent part:

(a) Surrogate authorization.

* * * *

(2) The following individuals or groups, in the specified order of priority, may make decisions about health care for a person who has not been certified to be incapable of making an informed decision and who has not appointed a health care agent in accordance with this subtitle. Individuals in a particular class may be consulted to make a decision only if all individuals in the next higher class are unavailable:

(i) A guardian for the patient, if one has been appointed;

(ii) The patient's spouse;

(iii) An adult child of the patient;

(iv) a parent of the patient;

(v) An adult brother or sister of the patient.

* * * *

(c) Standards for surrogates.—(1) Any person authorized to make health care decisions for another under this section shall base those decisions on the wishes of the patient and, if the wishes of the patient are unknown or unclear, on the patient's best interest.

OR. REV. STAT. § 127.635

Oregon Revised Statutes section 127.635 provides in pertinent part:

127.635. Withdrawal of life-sustaining procedures; conditions; selection of health care representative in certain cases; required consultation.

(1) Life-sustaining procedures as defined in ORS 127.505 which would otherwise be applied to an incapable principal who does not have an appointed health care representative or applicable valid advance directive may be withheld or withdrawn in accordance with subsections (2) and (3) of this section if the principal has been medically confirmed to be in one of the following conditions:

(a) A terminal condition;

(b) Permanently unconscious;

(c) A condition in which administration of life-sustaining procedures would not benefit the principal's medical condition and would cause permanent and severe pain; and

(d) The person has a progressive illness that will be fatal and is in an advanced stage, the person is consistently and permanently unable to communicate by any means, swallow food and water safely, care for the person's self and recognize the person's family and other people, and it is very

unlikely that the person's condition will substantially improve.

STATEMENT

A. Edna Folz's Condition

Edna Folz is a 73 year-old woman suffering through the end stages of very advanced Alzheimer's dementia, which was diagnosed in 1979. She lies in bed in a fetal position, hips and knees flexed, arms up to her chest, unable voluntarily to change body position, and in need of constant repositioning by others to avoid skin breakdown. She is incontinent of bowel and bladder, unable to feed herself and unable to follow even simple commands, such as closing her eyes or looking when her name is called. Although Edna exhibits general non-specific responses to mildly noxious stimuli, she shows no meaningful attempt to withdraw from such stimuli.

Edna has had a permanent, surgically implanted feeding tube since December 1988. While she was not capable of making treatment decisions when the feeding tube was inserted, the manifestations of her Alzheimer's disease were much more limited then than they were at the time this matter was before the trial court and than they are today. At the time her feeding tube was inserted, Edna appreciated her environment to some degree, she recognized family members, and, to a limited extent, she was able to enjoy social interaction.

Since Alzheimer's dementia is a progressive, degenerative disease of the cerebral cortex, for which there is no known cure, there is no chance that Edna will recover to a cognitive state or even to a minimal level of social or human functioning. Rather, her mental and physical conditions will continue to deteriorate. Currently, Edna's condition resembles a persistent vegetative state, but it does not meet the strict definition of that condition because she does exhibit minimal response to stimulation and can feel pain.

Prior to her illness, Edna was a vibrant and independent woman, an accomplished journalist, an involved com-

munity volunteer, and a devout Roman Catholic. She was and is dearly loved by her family and friends, who feel that she "would not want to be kept alive" in her current condition. The belief of family members that Edna would reject the treatment she currently receives is based on their knowledge of her values and previous life style, as well as a statement she made, at the age of 42 or 43, that she would rather die of cancer than lose her mind.

Edna has had an especially close relationship with her sister, Betty Spahn, the petitioner herein.

B. Proceedings in the Lower Courts

In October 1994, faced with Edna's deteriorating and hopeless condition, Edna's sister and court appointed guardian, Betty Spahn, determined that Edna would not have wanted continued artificial nutrition. Betty therefore asked the nursing facility in which Edna resided (and continues to reside) to discontinue her artificial feeding. The facility's ethics committee met to consider Betty's request and advised that it would be ethically appropriate to discontinue the artificial feeding, but required that the facility secure written consent for this discontinuation from all of Edna's potential heirs. All of Edna's family members did consent to the withdrawal of artificial nutrition, but one niece refused to memorialize her assent in writing. The nursing facility, therefore, insisted on a court order for the withdrawal of Edna's treatment.

On January 12, 1995, Betty filed a petition in the Wood County, Wisconsin Circuit Court seeking an Order confirming her authority, as guardian, to direct the withdrawal of artificial nutrition from Edna. Appen. *infra* 45a-50a. On January 13, 1995, the court appointed Mark E. Wittman as guardian ad litem to represent Edna's best interests.

Both the guardian and the guardian ad litem submitted briefs to the court in which they argued that in the case of *In re L.W.*, 167 Wis. 2d 53, 482 N.W.2d 60 (1992),

the Wisconsin Supreme Court held that an individual's right to refuse unwanted medical treatment emanates from both common law rights and the personal liberties protected by the Fourteenth Amendment to the federal constitution. [R. 8-1 to 8-8; R. 11-1 to 11-7] The parties also agreed that *In re L.W.*, squarely holds that this right extends to incompetent as well as competent individuals; that it includes the right to refuse or withdraw artificial nutrition and hydration; and that where the incompetent is in a persistent vegetative state, it may be exercised by a guardian, even where there are no clear statements of what the patient's treatment preferences would be, via application of a best interests analysis. [R. 8-3 to 8-5, 8-7; R. 11-2 to 11-7]

Although the *L.W.* decision expressly protects the treatment termination rights only of incompetents in a persistent vegetative state, the guardian argued that excluding all other incompetents from this protection would be unreasonable, illogical and violative of the Constitution. Appen. *infra* 51a-52a. [R. 8-7] The guardian therefore asked the trial court to apply the principles and rationale stated in *L.W.*, via either a best interests or a substituted judgment approach, to affirm Edna's guardian's request to terminate her artificial nutrition. The guardian ad litem agreed that termination of artificial nutrition would be in Edna's best interests.

After hearings held on March 22, 1995 and April 11, 1995, at which the Wood County Circuit Court heard testimony and oral argument, the trial court concluded that because Edna was not in a persistent vegetative state, it did not have authority under existing Wisconsin law to authorize her treatment termination. The Court issued a Memorandum Decision on April 17, 1997 and entered its final order denying the Guardian's petition on August 22, 1997. Appen. *infra* 42a-44a; 40a-41a.

On September 29, 1995, the Guardian appealed the trial court's ruling to the Wisconsin Court of Appeals and

also filed a petition to bypass the Court of Appeals with the Wisconsin Supreme Court. Appen. *infra* 38a-39a. In appellate court briefs, the guardian and guardian ad litem again argued that Edna has a fundamental liberty interest under the Fourteenth Amendment to be free from unwanted life sustaining medical treatment, including artificial nutrition and hydration, and that her guardian should be able to exercise that right on her behalf under either a substituted judgment or best interests analysis. [Guardian's Appellant's Brief to Wisconsin Court of Appeals at pp. 17-23, 29-45, 52-65; Guardian ad Litem's Reply Brief to Wisconsin Court of Appeals at pp. 6-19] The Guardian again stressed that to permit incompetent patients in a persistent vegetative state to exercise their liberty interest to refuse treatment, while prohibiting incompetent patients who are not in a persistent vegetative state from doing so, violates the non-persistently vegetative patients' federal constitutional rights. Appen. *infra* 53a-55a. [Guardian's Appellant Brief to Wiscsonsin Court of Appeals at pp. 52-66]

On April 16, 1995, the Wisconsin Supreme Court granted the petition to bypass, indicating that the Court of Appeals briefing could stand as the briefing to the state supreme court. Appen. *infra* 37a. In light of the fact that the brief of neither the guardian, nor the guardian ad litem, supported the trial court's decision, on September 19, 1996, the Wisconsin Supreme Court *sua sponte* ordered the appointment of a respondent-designate, Howard B. Eisenberg, to appear on behalf of the circuit court's decision. Appen. *infra* 36a. On November 20, 1996, the Wisconsin Supreme Court ordered that the parties be realigned to show the guardian ad litem as an appellant, along with the guardian, versus the respondent-designate. The parties subsequently submitted additional briefing and oral argument to the Wisconsin Supreme Court. Appen. *infra* 35a.

On June 12, 1997, the Wisconsin Supreme Court affirmed the trial court's decision. Appen. *infra* 1a-34a. In

its ruling, the Wisconsin Supreme Court affirmed its position that incompetents have a constitutionally protected right to refuse unwanted medical treatment, including nutrition and hydration, and that this right may be exercised by the incompentent's guardian utilizing a best interests analysis. Appen. *infra* 5a-7a. Where the incompetent is not in a persistent vegetative state, however, the Wisconsin court held that, "as a matter of law, it is not in the best interests of the ward to withdraw life-sustaining treatment, including a feeding tube, unless the ward has executed an advance directive or other statement clearly indicating his or her desires." Appen. *infra* 8a-9a. The Wisconsin Supreme Court's rationale for drawing a bright line rule separating incompetents in a persistent vegetative state from incompetents who are not persistently vegetative was its fear of falling down a confusing "slippery slope" toward legalized euthansia. Appen. *infra* 9a-10a. Accordingly, the court found that the state's interest in the preservation of life could not be outweighed by the constitutional rights of a non-vegetative incompetent person in circumstances such as those endured by Edna. Appen. *infra* 10a-11a.

REASONS FOR GRANTING THE PETITION

Before and since this Court's decision in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), numerous state courts have confronted the profoundly challenging issues surrounding treatment decision-making for severely and permanently ill, incompetent patients. Various state courts, including the Wisconsin Supreme Court, have concluded that the right to refuse unwanted treatment applies to both competent and incompetent individuals,[1] and that the "best interests" stand-

[1] *See In re Conroy*, 98 N.J. 321, 359, 486 A.2d 1209, 1229 (1985); *In re Roche*, 296 N.J. Super. 583, 588, 687 A.2d 349, 351 (1996); *Foody v. Manchester Mem. Hosp.*, 40 Conn. Supp. 127, 133, 482 A.2d 713, 718 (1984); *In re Torres*, 357 N.W. 2d 332, 339 (Minn. 1984); *John F. Kennedy Memorial Hospital, Inc. v. Bludworth*, 452 So. 2d 921, 923 (Fla. 1984); *In re Barry*, 445 So. 2d 365, 370 (Fla. App. 2d Dist. 1984); *In re Colyer*, 99 Wash. 2d 114, 124, 660 P.2d 738, 744 (1983); *In re Severns*, 425 A.2d 156, 159 (Del. Ch. 1980);

ard should be applied when deciding whether to withdraw treatment from an incompetent patient if evidence of the patient's preferences is lacking.[2]

Application of the best interests standard in treatment termination decisions for incompetent patients who have not previously documented their health care preferences is an issue not addressed in *Cruzan,* not uniformly addressed in state law, and of profound importance to countless patients and their loved ones nationwide. The decision of the Wisconsin Supreme Court, which precludes a best interests determination to withhold or withdraw treatment for incompetent persons who are not persistently vegetative, directly conflicts with state supreme court decisions and/or legislation in New Jersey, Arizona, Washington, Georgia, Maryland and Oregon, and it deprives incompetents of their substantive due process liberty interests and their constitutional right to equal protection. The sharp conflict in state law throughout the country, Wisconsin's improper disparate treatment of incompetent persons, and the wrenching urgency of providing clear and equitable guidance to those entrusted with decision making for incompetent and seriously ill individuals, warrants immediate review by this Court.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER STATE SUPREME COURTS AND WITH VARIOUS STATE STATUTES

In *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985), the New Jersey Supreme Court held that life-sustaining

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Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 736, 744, 370 N.E.2d 417, 423, 427 (1977); *In re Quinlan*, 70 N.J. 10, 41, 355 A.2d 647, 664, *cert. denied*, 429 U.S. 922 (1976); *Rasmussen v. Fleming*, 154 Ariz. 207, 219, 741 P.2d 674, 686 (1987); *In re L.H.R.*, 253 Ga. 439, 440, 445, 321 S.E.2d 716, 718, 722 (1984); *Mack v. Mack*, 329 Md. 188, 211, 618 A.2d 744, 756 (1993); *In re L.W.*, 167 Wis. 2d 53, 73-74, 482 N.W.2d 60, 67 (1992).

[2] *Rasmussen*, 154 Ariz. at 222, 741 P.2d at 689 (1987); *Barber v. Superior Court*, 147 Cal. App. 3d 1006, 1021, 195 Cal. Rptr. 484, 493 (1983); *Foody*, 40 Conn. Supp. at 139, 482 A.2d at 721 (1984); *In re L.W.*, 167 Wis. 2d at 74-76, 482 N.W.2d at 68 (1992).

treatment may be withheld or withdrawn from an incompetent patient *who is not in a persistent vegetative state* if either of two "best interest" tests—a limited or pure objective test—is satisfied. *Conroy,* 98 N.J. at 387, 486 A.2d at 1244. The New Jersey Supreme Court's holding reversed the state court appellate decision, which had held that the right to terminate life-sustaining treatment based on a guardian's judgment was limited to incurable and terminally ill patients who are brain dead, irreversibly comatose, or vegetative. *See In re Conroy,* 190 N.J. Super. 453, 469, 464 A.2d 303, 312 (1983). The *Conroy* Court explicitly acknowledged that its holding broadened the applicability of principles it had enunciated in its previous *Quinlan* decision, which dealt with treatment decision-making for a specific category of patients—i.e., those in a persistent vegetative state. *Conroy,* 98 N.J. at 358-362, 486 A.2d at 1228-39 citing *In re Quinlan,* 70 N.J. 10, 355 A.2d 647, *cert. denied,* 429 U.S. 922 (1976). The New Jersey Court held:

> Under the limited-objective test, life-sustaining treatment may be withheld or withdrawn from a patient in Claire Conroy's situation [i.e. confined to bed, incontinent, unable to speak, suffering with arteriosclerotic heart disease, hypertension, diabetes mellitus, and an eye problem, but able to interact with her environment in some limited ways and *not* in a chronic vegetative state] when there is some trustworthy evidence that the patient would have refused the treatment, and the decision maker is satisfied that it is clear that the burdens of the patient's continued life with the treatment outweigh the benefits of that life for him.

Conroy, 98 N.J. at 365, 486 A.2d at 1232. The Court added that if there is no evidence that the patient would have declined the treatment:

> life-sustaining treatment may still be withheld or withdrawn if a pure-objective test is satisfied. Under that test, . . . the net burdens of the patient's life with the treatment should clearly and markedly out-

> weigh the benefits that the patient derives from life. Further, the recurring, unavoidable and severe pain of the patient's life with the treatment should be such that the effect of administering life-sustaining treatment would be inhumane.

Id., 98 N.J. at 366, 486 A.2d at 1232.

The New Jersey Supreme Court explicitly acknowledged that "for some incompetent patients it might be impossible to be clearly satisfied as to the patient's intent either to accept or reject the life-sustaining treatment." *Id.* at 363, 486 A.2d at 1231. Nonetheless, the New Jersey Court refused "to foreclose the possibility of humane actions, which may involve termination of life-sustaining treatment, for persons who never clearly expressed their desires about life-sustaining treatment but who are now suffering a prolonged and painful death." *Id.*

More recently, the Supreme Court of Georgia reaffirmed that the right to refuse treatment is not lost because of the inability or failure to have left prior treatment directives. In *In re Jane Doe,* 262 Ga. 389, 391, 418 S.E.2d 3, 5 (1992), the Georgia court upheld the authority of parents to exercise the right to refuse treatment on behalf of their child, on the grounds that parents' "natural bonds of affection" lead them "to act in the best interests of their children." *Id.*, 262 Ga. at 392, n.6, 415 S.E.2d 3, n.6. The Court expressly rejected arguments that this right to refuse treatment should be limited to circumstances where the incompetent patient is in a persistent vegetative state, asserting, "while medical technology and society's understanding of death and dying continue to evolve and change, we cannot mandate a single static formula for deciding when deescalation of medical treatment may be appropriate. Rather, we endorse the view that medical decision making for incompetent patients is most often best left to the patient's family (or other designated proxy) and the medical community." *Id.*

In *Rasmussen v. Fleming,* 154 Ariz. 207, 741 P.2d 674 (1987), the Arizona Supreme Court held that: a) the "best

interests" standard should be used to guide treatment decisionmaking where no reliable evidence of the incompetent patient's intent exists; and b) under the best interests standard, the surrogate decisionmaker "assesses what medical treatment would be in the patent's best interests as determined by such objective criteria as relief from suffering, preservation or restoration of functioning, and quality and extent of sustained life. . . . 'An accurate assessment will encompass consideration of the satisfaction of present desires, the opportunities for future satisfactions, and the possibility of developing or regaining the capacity for self-determination.' " *Id.*, 154 Ariz. at 222, 741 P.2d at 689 [citations omitted]. The patient's guardian in *Rasmussen* sought to terminate the patient's artificial nutrition and to secure "do not resuscitate" and "do not hospitalize" orders for the patient. *Id.*, 154 A.2d at 211, 741 P.2d at 678. While Ms. Rasmussen was persistently vegetative, the Arizona court did not limit the application of the best interests criteria to persons in a persistent vegetative state. Rather, it recognized that its criteria would govern future cases, and it clearly delineated best interest factors which apply to conditions other than persistent vegetative state. *Id.*, 154 Ariz. at 222, 224, 741 P.2d at 689.

The Washington Supreme Court, in *In re Grant*, 109 Wash. 2d 545, 747 P.2d 445 (1987), *modified* 757 P.2d 534 (1988), adopted similar factors for consideration in making a best interests treatment termination determination. The Washington court held that in evaluating whether an incompetent patient's best interests would be furthered by treatment termination, decisionmakers are to consider:

> the patient's present level of physical, sensory, emotional, and cognitive functioning; the degree of physical pain resulting from the medical condition, treatment, and termination of the treatment, respectively; the degree of humiliation, dependence, and loss of dignity probably resulting from the condition and treatment; the life expectancy and prognosis for re-

> covery with and without treatment . . . and the risks, side effects, and benefits of each of those options.

Grant at 568, 747 P.2d at 457, *quoting Conroy*, 98 N.J. at 397, 486 A.2d at 1231. The *Grant* decision does not require the patient to be in a persistent vegetative state for treatment termination based on best interests. Rather, it permits the incompetent individual's guardian to apply the best interests analysis where the "patient is in an advanced stage of a terminal and incurable illness and is suffering severe and permanent mental and physical deterioration." *Grant*, 109 Wash. 2d at 568, 747, P.2d at 457.[3]

In addition, Maryland and Oregon have enacted legislation that allows an incapacitated patient's surrogate decisionmaker to direct the withdrawal or withholding of life-sustaining treatment, on the basis of the patient's best interests, in conditions *other than* persistent vegetative state. Maryland's Health Care Decision Act accommodates "best interest" treatment decisions for incompetents by surrogates where the wishes of the patient are unclear or unknown, with "best interest" defined as follows:

> (e) Best interest.—"Best interest" means that the benefits to the individual resulting from a treatment outweigh the burdens to the individual resulting from that treatment, taking into account:

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[3] Other lower state courts, absent direction from this Court and their own higher state courts, have also concluded that the best interests standard for treatment decision making is appropriately applied in circumstances not limited to persistent vegetative state. *See In re C.A.*, 236 Ill. App. 3d 594, 603 N.E.2d 1171 (1992) (upholding guardian's right to authorize "do not resuscitate" order on basis of "best interests" standard for infant who was *not* in a persistent vegetative state, who suffered from interventricular hemorrhages, was HIV infected and developmentally delayed and had a terminal bowel infection, but was fully conscious and aware of her surroundings); *In re Rosebush*, 195 Mich. App. 675, 491 N.W.2d 633 (1992) (holding that the best interests approach should govern decisions to withdraw life-sustaining measures from never competent patients and applying the guidelines set forth *In re Grant*, *supra*).

> (1) The effect of the treatment on the physical, emotional, and cognitive functions of the individual;
>
> (2) The degree of physical pain or discomfort caused to the individual by the treatment, or the withholding or withdrawal of the treatment;
>
> (3) The degree to which the individual's medical condition, the treatment, or the withholding or withdrawal of treatment result in a severe and continuing impairment of the dignity of the individual by subjecting the individual to the condition of extreme humiliation and dependency;
>
> (4) The effect of the treatment on the life expectancy of the individual;
>
> (5) The prognosis of the individual for recovery, with and without the treatment;
>
> (6) The risks, side effects, and benefits of the treatment or withholding or withdrawal of the treatment; and
>
> (7) The religious beliefs and basic values of the individual receiving treatment, to the extent these may assist the decision maker in determining best interest.

Md. Code Ann., [Health-Gen.] § 5-601(e) (1996). *See also* Md. Code Ann., [Health-Gen.] §§ 5-605(a)(2)(i)-(v), 5-605(c).

Similarly, Oregon's statutory law allows surrogates to direct the withholding or withdrawing of life sustaining treatment not only for patients in persistent vegetative states, but for those who have a terminal condition, those for whom life-sustaining procedures would provide no benefit but would cause permanent and severe pain, and those who have a "fatal, advanced progressive illness" such that the illness:

> will be fatal and is in an advanced stage, [and] the person is consistently and permanently unable to communicate by any means, swallow food and water safely, care for the person's self and recognize the

> person's family and other people, and it is very unlikely that the person's condition will substantially improve.

Or. Rev. Stat. § 127.635(d) (1996). *See* Or. Rev. Stat. § 127.635(1)(a)-(d) (1996).

In contrast to the foregoing court decisions and state statutes, the Wisconsin Supreme Court held that, "as a matter of law", if an incompetent person is not in a persistent vegetative state, the withdrawal of life-sustaining treatment, including a feeding tube, can only be in the incompetent's best interests if the incompetent "has executed an advance directive or other statement clearly indicating his or her desires." Appen. *infra* 17a. This overly rigid definition of the "best interests" standard guts its intended utility in guiding treatment decisionmaking for incompetent patients by foreclosing reference to objective, societally shared criteria when the patient's preferences are not discernable. Moreover, it expressly deprives patients who have always been incompetent, and who could not have executed an advance directive or other clear indication of their desires, of the right to be free from unwanted treatment.

Under the Wisconsin Supreme Court's "best interests" approach, for a patient who is not persistently vegetative, the interest in maintaining physiological life as long as medically possible *always* trumps other interests. Consideration of factors such as relief of pain and discomfort, prospects for restored functioning, and the intrusiveness of the treatment is precluded. Yet, as recognized by the courts of other states, case-by-case analysis of these factors is *exactly* what is envisioned by the best interests analysis, because requiring some individuals to remain in hopeless conditions of irreversible illness and pain not only violates their best interests, it is inhumane and violative of their federal constitutional substantive due process rights.

The conflict of authority among jurisdictions indicates that the lower courts and state legislatures are engaged

in a profound struggle to come to a full understanding of the precedent established by this Court in *Cruzan*. On account of these conflicting state court holdings and laws, protection of incompetent persons' constitutional liberty interests to be free from unwanted treatment depends upon the state in which they are found. Resolution of this conflict requires immediate review by this Court.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND VIOLATES THE EQUAL PROTECTION CLAUSE

This Court has long protected the individual's right to "the possession and control of his own person." *Union Pacific R. Co. v. Botsford*, 141 U.S. 250 (1891).[4] With specific respect to the right to control one's course of medical treatment, in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), this Court stated that: "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." *Cruzan* at 278.

Moreover, the holdings of this Court support the notion that an individual's incompetence does not diminish this liberty interest. *See Youngberg v. Romeo*, 457 U.S. 307, 315-316, 319 (1982) (holding that severely retarded minor's liberty interests in safety, freedom from bodily restraint, and reasonable training survive involuntary commitment); *Parham v. J.R.*, 442 U.S. 584, 600 (1979) (recognizing a child's substantial liberty interest in not being confined unnecessarily for medical treatment); *Jackson v. Indiana*, 406 U.S. 715, 730, 738

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[4] *See also Skinner v. Oklahoma*, 316 U.S. 535, 541-43 (1942) (prohibiting state from controlling, by sterilization, which convicts might reproduce); *Rochin v. California*, 342 U.S. 165, 172 (1952); *Schmerber v. California*, 384 U.S. 757, 772 (1966) ("The integrity of an individual's person is a cherished value of our society."); *Mills v. Rogers*, 457 U.S. 291, 294 n.4 (1982) ("[T]he right to refuse any medical treatment emerged from the doctrines of trespass and battery, which were applied to unauthorized touchings by a physician.").

(1972) (holding that Indiana could not violate due process and equal protection rights of a mentally retarded deaf mute by committing him for an indefinite amount of time simply because he was incompetent to stand trial on the criminal charges filed against him). For incompetent individuals, the question is not whether such liberty interests exist; it is how such interests are to be protected. As this Court explained in *Thompson v. Oklahoma*, 487 U.S. 815, 825 n.23 (1988), "Children, the insane, and those who are irreversibly ill with loss of brain function, for instance, all retain 'rights' to be sure, but often such rights are only meaningful as they are exercised by agents acting with the best interests of their principals in mind."

The Wisconsin Supreme Court has ruled that all incompetent persons who are not in a persistent vegetative state simply lose their constitutionally protected liberty interest in making choices about their medical treatment, except in those rare cases where they have left prior directives.[5] Guardians and loved ones of these Wisconsin individuals are now precluded from making a treatment decision, together with health care providers, that would reflect the patient's interests more closely and serve the patient's best interests more effectively than would a purely technological decision to do whatever is possible. Yet, incompetents in Wisconsin who *are* in a persistent vegetative state and never left prior directives, never made clear treatment preference statements, never exhibited conduct upon which a substituted judgment could be made, or never were competent, *retain* their right to refuse or cease unwanted life-sustaining medical treatment, as exercised by their guardians on the basis of their best interests. *See L.W.*, 167 Wis. 2d at 74-76, 78, 482 N.W.2d at 67-68, 70.

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[5] One court advanced the following in explaining why only so few persons have executed advance directives: "The typically human characteristics of procrastination and reluctance to contemplate the need for . . . arrangements [such as advance directives] . . . makes [such documents] a tool which will all too often go unused by those who might desire it." *Barber v. Superior Court*, 147 Cal. App. 3d 1006, 1015, 195 Cal. Rptr. 484, 489 (1983).

The Equal Protection Clause of the 14th Amendment commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Classification in legislation or state court action that impinges on "basic civil rights" is subject to "strict scrutiny", *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and can be upheld only if it serves a compelling state interest. *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). The Wisconsin Supreme Court's decision cannot survive such scrutiny—indeed, it cannot survive the less restrictive rational relationship test. *Id.*, 473 U.S. at 442.

Wisconsin law recognizes that for incompetents in a persistent vegetative state, the existence and viability of their constitutional liberty interest to be free from unwanted treatment "does not hinge upon its prescient exercise, nor is it extinguished when one is adjudged incompetent." *L.W.*, 167 Wis. 2d at 74, 482 N.W.2d at 67. It also recognizes that the failure of a person to have made an advance directive "is not a decision to accept all treatment, [and that] society's increasing ability to prolong the dying process [should not] make it one," and further that "[t]he right to refuse unwanted treatment must also extend to those who have never been competent. *Id.*, 167 Wis. 2d at 75, 482 N.W.2d at 68.

Yet, the Wisconsin Supreme Court now completely excludes the exercise of guardian discretion in treatment decisionmaking for patients who are seriously ill but not persistently vegetative and who did not, or could not, leave clear prior directives. For all children and mentally disabled patients who, by definition, could not have formulated treatment directives, and for the vast majority of now-incompetent seriously ill adults who did not leave such directives, treatment must be provided and may not be withdrawn regardless of decisionmakers' good faith analysis of the benefits and burdens of that treatment for the patient. Ironically, adequately protecting the liberty interests of this patient group, as compared to patients in persistent vegetative state, is more dependent on case-by-case consideration of treatment benefits and burdens, be-

cause unlike individuals in persistent vegetative state, these patients *do* feel the pain and discomfort of medical procedures, and they *may* sense the humiliation and intrusiveness of treatment.[6] Under the Wisconsin Supreme Court's rule, though, this patient group is denied the right to individualized assessment by their guardians and loved ones as to whether continued treatment will be in their best interests. Instead, "as a matter of law", they are forced to endure continued application of all life-sustaining treatment regardless of the pain, suffering and humiliation it may cause.

III. THIS CASE PRESENTS PUBLIC POLICY ISSUES OF NATIONAL IMPORTANCE

Medical advances have dramatically altered physiological conditions of both life and death. While scientific and technological capabilities now offer new possibilities of cure, for some severely ill patients, "medical technology has effectively created a twilight zone of suspended animation where death commences while life, in some form, continues." *Rasmussen,* 154 Ariz. at 211, 741 P.2d at 678. Many individuals want no part of a life sustained only by medical technology. If a guardian can never recommend treatment termination for a ward who is not permanently vegetative (unless, as is rare, the patient left a clear prior directive), physicians will be less likely to treat incompetent wards aggressively while there is still hope of recovery, and guardians will be less likely to authorize such aggressive treatment. As explained by the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research: "[A]n even more troubling wrong occurs when a treatment that might save life or improve health is not started because the health care personnel are afraid that they will find it very difficult to stop treatment if, as is fairly likely, it proves to be of

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[6] Patients in persistent vegetative state are completely incapable of participating in or recognizing their environment. They have no cognitive abilities and only the most primitive ability to respond to stimuli. *See In re L.W.*, 167 Wis. 2d 53, 482 N.W.2d 60 (1992).

little benefit and greatly burdens the patient." [7] The *Conroy* court, too, recognized that family and doctors may be discouraged, on account of inability to later stop life support measures, from "even attempting certain types of care [which] could thereby force them into hasty and premature decisions to allow a patient to die." *In re Conroy*, 98 N.J. 3d 321, 370, 486 A. 2d 1209, 1234 (1985).

The incidence of this barrier to treatment initiation will vary, state by state, on account of the current divergence among the states regarding application of the "best interests" standard for terminating treatment for patients who are not persistently vegetative. In addition, families and care givers who have authorized treatment for incompetent patients in some states will be faced with the horrible, yet real, prospect that the only way to protect their incompetent loved ones' best interests is to move them to a state that honors their constitutional liberty interests to terminate treatment.

The issues surrounding "best interests" treatment decisionmaking for hopelessly ill, incompetent patients present constantly changing and challenging variables, as science and technology push back the threshold of our knowledge. The states need uniform guidance from this Court on these issues, because proper resolution hinges upon the nature and strength of individuals' federal constitutional liberty interests.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

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[7] President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Deciding to Forego Life-Sustaining Treatment* at 75 (1983).

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

SUPREME COURT OF WISCONSIN

No. 95-2719

IN THE MATTER OF THE GUARDIANSHIP AND PROTECTIVE PLACEMENT OF EDNA M.F. BETTY SPAHN, GUARDIAN OF EDNA M.F. AND MARK WITTMAN, GUARDIAN AD LITEM FOR EDNA M.F.,

Appellants,

v.

HOWARD B. EISENBERG,

Respondent-Designate.

Argued Jan. 8, 1997
Decided June 12, 1997

DONALD W. STEINMETZ, Judge.

Betty Spahn (Spahn) seeks review of a decision by the Circuit Court for Wood County, Judge Dennis D. Conway, denying her request to withdraw artificial nutrition from her sister, Edna M.F. The court held that it was without authority to grant Spahn's request because Edna is not in a persistent vegetative state. This case presents this court with two issues:

1) Whether the guardian of an incompetent person who has not extended an advance directive and is not in a persistent vegetative state has the authority to direct withdrawal of life sustaining medical treatment from the incompetent person; and

2) Whether in this case, notwithstanding the fact that she is not in a persistent vegetative state, there is

> a clear statement evidenced in the record of Edna's desire to die rather than have extreme measures applied to sustain her life under circumstances such as these.

Relying on this court's previous decision in In re Guardianship of L.W., 167 Wis.2d 53, 482 N.W.2d 60 (1992), we hold that a guardian may only direct the withdrawal of life-sustaining medical treatment, including nutrition and hydration, if the incompetent ward is in a persistent vegetative state and the decision to withdraw is in the best interests of the ward. We further hold that in this case, where the only indication of Edna's desires was made at least 30 years ago and under different circumstances, there is not a clear statement of intent such that Edna's guardian may authorize the withholding of her nutrition.

Edna M.F. is a 71-year old woman who has been diagnosed with dementia of the Alzheimer's type. She is bedridden, but her doctors have indicated that she responds to stimulation from voice and movement. She also appears alert at times, with her eyes open, and she responds to mildly noxious stimuli.[1] According to these doctors, her condition does not meet the definition of a persistent vegetative state. In 1988, a permanent feeding tube was surgically inserted in Edna's body. Edna currently breathes without a respirator, but she continues to receive artificial nutrition and hydration. Edna's condition is not likely to improve.

Edna's sister and court-appointed guardian, Betty Spahn, seeks permission to direct the withholding of Edna's nutrition, claiming that her sister would not want to live in this condition. However, the only testimony presented at trial regarding Edna's views on the use of life-sustaining medical treatment involves a statement made in 1966 or

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[1] In his testimony at trial, Dr. John Przybylinski, one of Edna M.F.'s doctors, described the mildly noxious stimuli as "either pinching her arm or her leg or rubbing her sternum."

1967. At that time, Spahn and Edna were having a conversation about their mother, who was recovering from depression, and Spahn's mother-in-law, who was dying of cancer. Spahn testified that during this conversation, Edna said to her: "I would rather die of cancer than lose my mind." Spahn further testified that this was the only time that she and Edna discussed the subject and that Edna never said anything specifically about withholding or withdrawing life-sustaining medical treatment.

In October of 1994, the Ethics Committee at the Marshfield Nursing and Rehabilitation, the facility where Edna lives, met to discuss the issue of withholding artificial nutrition from Edna. The committee approved the withholding of the nutrition if no family member objected. However, one of Edna's nieces refused to sign a statement approving the withdrawal of nutrition.

On January 12, 1995, Spahn filed a petition in Wood County Circuit Court as guardian of an incompetent person, Edna M.F., asking the court to issue an order confirming Spahn's decision to withhold nutrition from Edna. On January 13, 1995, the court appointed Mark Wittman (Wittman) as the guardian ad litem. The court denied Spahn's petition. The case is now before this court on a petition to bypass the court of appeals. However, because both Spahn and Wittman are arguing to withhold nutrition, this court has appointed Attorney Howard Eisenberg as respondent-designate to argue for sustaining the life of Edna M.F.

The issue of the right to terminate life-sustaining medical treatment first came to the national forefront in the controversial case In re Quinlan, 70 N.J. 10, 355 A.2d 647 (1976), cert. denied sub nom., 429 U.S. 922, 97 S.Ct. 319, 50 L.Ed.2d 289 (1976). In Quinlan, Joseph Quinlan petitioned the court to be appointed guardian of his 21-year old daughter, Karen. Karen was in a chronic

persistent vegetative state [2] and her father sought the express power to authorize "the discontinuance of all extraordinary medical procedures now allegedly sustaining Karen's vital processes and hence her life . . . ." Id. 355 A.2d at 651. Because Karen existed in a persistent vegetative state, and there was no hope of her ever recovering from this state, the court granted Joseph Quinlan's requests. Id. 355 A.2d at 671-72.

Fourteen years later, the United States Supreme Court considered whether the state of Missouri could require clear and convincing evidence of an incompetent's wishes before authorizing the withdrawal of life-sustaining medical treatment, including nutrition and hydration, when the incompetent is in a persistent vegetative state.[3] Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990). In making its decision, the Court determined that the states have an interest in protecting the lives of their citizens and that that interest is demonstrated, among other ways, "by treating homicide as a serious crime." Id. at 280, 110 S.Ct. at 2852. On the other hand, the Court notes that "[i]t cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment." Id. at 281, 110 S.Ct. at 2853. The Court concludes that the rights of the state

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[2] Dr. Fred Plum, the doctor who created the term, defined a person in a persistent vegetative state "as a subject who remains with the capacity to maintain the vegetative parts of neurological function but who . . . no longer has any cognitive function." Quinlan, 355 A.2d at 654. Cognitive function can be best understood as "either self-awareness or awareness of the surroundings in a learned manner." See In re Jobes, 108 N.J. 394, 529 A.2d 434, 438 (1987).

[3] The Court in Cruzan defined persistent vegetative state as "a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive function." Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, 266. 110 S.Ct. 2841, 2845, 111 L.Ed.2d 224 (1990).

and the individual must be balanced: "we think a State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual." Id.

The Court upheld the decision of the Missouri Supreme Court to require that a guardian meet a "clear and convincing" standard before terminating an incompetent's life-sustaining medical treatment, including artificial nutrition and hydration.[4] The Court explained that these life-and-death decisions have great consequences, and that an erroneous decision to terminate cannot be remedied:

> An erroneous decision not to terminate results in a maintenance of the status quo; the possibility of subsequent developments such as advancements in medical science, the discovery of new evidence regarding the patient's intent, changes in the law, or simply the unexpected death of the patient despite the administration of life-sustaining treatment at least create the potential that a wrong decision will eventually be corrected or its impact mitigated. An erroneous decision to withdraw of life-sustaining treatment, however, is not susceptible to correction.

Id. at 283-84, 110 S.Ct. at 2854.

Two years after the Cruzan decision was rendered, this court was faced with a similar case, In re Guardianship of L.W., 167 Wis.2d 53, 482 N.W.2d 60 (1992). In L.W., this court considered the issue of whether an incompetent individual in a persistent vegetative state

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[4] We note here that the Cruzan Court did not decide that the liberty interest in refusing life-sustaining medical treatment includes the right to refuse nutrition and hydration. The Court merely assumed so for the purposes of ruling on the proper evidentiary standard in the case. See In re Guardianship of L.W., 167 Wis.2d 53, 71, 482 N.W.2d 60 (1992).

has the right to refuse life-sustaining medical treatment, including nutrition and hydration. The court further considered whether a court-appointed guardian may exercise that right on behalf of the incompetent patient. This court began its analysis of the situation with an exploration of the possible constitutional rights implicated by these circumstances, and concluded "that an individual's right to refuse unwanted medical treatment emanates from the common law right of self-determination and informed consent, the personal liberties protected by the Fourteenth Amendment, and from the guarantee of liberty in Article I, section I of the Wisconsin Constitution." Id. at 67, 482 N.W.2d 60.

This court further concluded that the right to refuse unwanted treatment applies to both competent and incompetent individuals, and that the right of the incompetent to refuse may be exercised by his or her guardian. Id. at 73, 76, 482 N.W.2d 60. The court in L.W. then faced the choice of what standard the guardian should apply in determining whether to continue life-sustaining medical treatment. The guardian argued for a subjective test considering the ward's past values, wishes, and beliefs (the "substituted judgment" standard), and the guardian ad litem argued in favor of the standard upheld in Cruzan requiring "clear and convincing evidence" of the ward's desires. Noting that this court has rejected the substituted judgment standard in the past [5] and that the clear and convincing evidence standard would be too strict, this court concluded that an objective "best interests" standard

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[5] In the case of In re Guardianship of Pescinski, 67 Wis.2d 4, 7-8, 226 N.W.2d 180 (1975), this court held that a guardian must act under the "best interests" standard with respect to the ward, and the court explicitly declined to adopt the "substituted judgment" standard.

In the case of In re Guardianship of Eberhardy, 102 Wis.2d 539, 307 N.W.2d 881 (1981), the court again chose to apply the "best interests" standard to the guardian-ward relationship. See Id., at 566, 567. 307 N.W.2d 881.

was the appropriate standard to apply when deciding whether to withdraw life-sustaining medical treatment from an incompetent ward in a persistent vegetative state. Id. at 76, 78, 81, 482 N.W.2d 60. The only thing that matters in the decision-making process is what would be in the ward's best interests. Of course, the court noted, if the wishes of the ward are clearly evidenced, then it is in the best interests of the ward to have his or her wishes honored. Id. at 79-80, 482 N.W.2d 60.

In sum, this court concluded in L.W. "that an incompetent individual in a persistent vegetative state has a constitutionally protected right to refuse unwanted medical treatment, including artificial nutrition and hydration," and that a guardian may consent to withholding or withdrawal of such treatment without prior approval of the courts if to do so is in the "best interests" of the ward. Id. at 63, 482 N.W.2d 60. However, this court stressed the fact that the opinion in L.W. "is limited in scope to persons in a persistent vegetative state." Id.

Spahn asks this court to extend L.W. beyond its current scope to include incompetent wards who are not in a persistent vegetative state. Spahn notes that in L.W., this court concluded that the right to refuse unwanted medical treatment applies to competent and incompetent people alike, even if there has been no advance directive on the part of the incompetent ward.

In the case In re Guardianship of Eberhardy, 102 Wis.2d 539, 307 N.W.2d 881 (1981), this court was faced with the request to authorize a guardian of an incompetent to consent to the sterilization of the incompetent, a mentally disabled woman. The guardian argued that since the competent person has the right to sterilization, that right should not be withheld from the incompetent. This court explained in Eberhardy that even though all citizens have the same constitutional rights, the United States Supreme Court has recognized that "the uninhibited

exercise of those rights may be hedged about with restrictions that reflect the public policy of protecting persons of a distinct class." Id. at 572, 307 N.W.2d 881. For example, this court notes that the Supreme Court has recognized that the decision by a minor to have an abortion could be circumscribed by action requiring a showing of maturity or "best interests" to make a decision without parental involvement. Id. at 572, 307 N.W.2d 881, citing Bellotti v. Baird, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979). Additionally, a state may require a physician to notify a minor's parents before agreeing to perform an abortion. Id. at 572-73, 307 N.W.2d 881, citing H.L. v. Matheson, 450 U.S. 398, 101 S.Ct. 1164, 67 L.Ed.2d 388 (1981).

The Eberhardy court proceeded to explain that the mentally disabled are a similar class to minors in that they are also subject to "special protections of the state" because many mentally disabled adults are "not competent to exercise a free choice." Id. at 573, 307 N.W.2d 881. The court explained that "[w]hile the Constitution would generally mandate a free choice for sui juris adults, a free choice is an empty option for those who cannot exercise it." Id.

This brings us to the situation at hand—whether this court should allow surrogate decisionmakers to decide to withhold or withdraw life-sustaining medical treatment from an incompetent adult who is not in a persistent vegetative state. This court in Eberhardy said that for the purposes of sterilization, incompetent people are to be considered "a distinct class to whom the state owes a special concern." Id. at 574, 307 N.W.2d 881. So, although incompetent adults have the same constitutional rights as competent adults, they do not have the same ability to exercise those rights. Someone must instead act in the best interests of that person to make a decision regarding whether to withhold or withdraw life-sustaining treatment. However, if that person is not in a persistent

vegetative state, this court has determined that, as a matter of law, it is not in the best interests of the ward to withdraw life-sustaining treatment, including a feeding tube, unless the ward has executed an advance directive or other statement clearly indicating his or her desires.

One of the main reasons that this court in L.W. limited the scope of its holdings is the fact that The American Academy of Neurology explains that people in a persistent vegetative state do not feel pain or discomfort. L.W., 167 Wis.2d at 87, note 17, 482 N.W.2d 60. In the case at bar, Edna M.F. is not in a persistent vegetative state and could therefore likely feel the pain and discomfort of starving to death. Even a competent person cannot order "the withholding or withdrawal of any medication, life-sustaining procedure or feeding tube" if "the withholding or withdrawal will cause the declarant pain or reduce the declarant's comfort" unless the pain or discomfort can be alleviated through further medical means. Wis. Stat. § 154.03(1). See also Wis. Stat. §155.20(4). In the case where withdrawal of life-sustaining medical treatment, including nutrition or hydration, will cause pain or discomfort, then, the competent and incompetent person have exactly the same rights.[6]

This court has established a bright-line rule in L.W. that the guardian of an incompetent ward possesses the authority to direct withholding or withdrawal of life-sustaining medical treatment, including artificial nutrition and hydration, if it is in the best interests of the ward and the ward is in a persistent vegetative state. Spahn now asks this court to extend the scope of L.W. to include those incompetent patients who are afflicted with incurable or irreversible conditions of health. We decline to go down this slippery slope, for the consequences and

[6] Of course, a competent and incompetent person always have the same rights. See generally In re Guardianship of L.W., 167 Wis.2d 53, 73-74. 482 N.W.2d 60 (1992).

the confusion may be great. One author explains as follows:

> While at first euthanasia may be institutionalized only for those in terrible pain, or those who are terminally ill, or those for whom it is otherwise appropriate, the pressure of the allocation of health care resources will inevitably enlarge the class for whom euthanasia is deemed appropriate. Every society has a group who are deemed to be socially unworthy and members of that group—the uneducated, the unemployed, the disabled, for example—will become good candidates for euthanasia.

Barry R. Furrow et al., Bioethics: Health Care Law and Ethics 325 (1991). This court has drawn a bright-line in L.W., and we will not venture down the slippery slope of extending it when there is insufficient evidence of the ward's desires.

Even though Edna M.F. is not currently existing in a persistent vegetative state, if her guardian can demonstrate by a preponderance of the evidence a clear statement of Edna's desires in these circumstances, then it is in the best interests of Edna to honor those wishes.[7] See L.W., 167 Wis.2d at 79-80, 482 N.W.2d 60. The reason this court requires a clear statement of the ward's desires is because of the interest of the state in preserving human life[8] and the irreversible nature of the decision to with-

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[7] We stress that this right has been limited by the legislature in Wis. Stat. § 154.03(1), which does not permit withdrawal of life-sustaining medical treatment, including nutrition and hydration, if it would cause pain or discomfort unless the pain or discomfort can be alleviated through further medical means.

[8] This court has set out the four relevant state interests that must be considered in making decisions about medical treatment decisions for incompetent people. These are 1) preserving life, 2) safeguarding the integrity of the medical profession, 3) preventing suicide, and 4) protecting innocent third parties. In re Guardian-

draw nutrition from a person. This court explained the magnitude of this type of decision as compared to other, less permanent, decisions in Eberhardy:

> Importantly, however, most determinations made in the best interests of a child or an incompetent person are not irreversible; and although a wrong decision may be damaging indeed, there is an opportunity for a certain amount of empiricism in the correction of errors of discretion. Errors of judgment or revisions of decisions by courts and social workers can, in part at least, be rectified when new facts or second thoughts prevail. . . . Sterilization as it is now understood by medical science is, however, substantially irreversible.

Eberhardy, 102 Wis.2d at 567-68, 307 N.W.2d 881. Like sterilization, the decision to withdraw life-sustaining medical treatment is also not reversible, because death is not reversible. It is for this reason, then, that we require a guardian to show a clear statement of the ward's desires by a preponderance of the evidence.

We now turn to the case at bar to determine whether there is sufficient evidence in the record to reflect a clear statement of desire by Edna M.F. while she was still competent. The trial court did not make an explicit factual finding as to whether the guardian met this burden. However, it did mention in its memorandum decision that none of the witnesses who presented letters and affidavits to the court ever discussed the matter with Edna M.F., and that the only testimony as to Edna's opinions on the situation dates back to 1966 or 1967. Generally, findings of fact shall not be set aside unless they are clearly erroneous, Wis. Stat. § 805.17(2), but in a situation where there are no explicit factual findings, "this court may affirm the judgment if '[a] perusal of the

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ship of L.W., 167 Wis.2d 53, 90, 482 N.W.2d 60. Preserving life is the most significant state interest at issue here. See id.

evidence shows that the court reached a result which the evidence would sustain if specifically found.'" Grimh v. Western Fire Ins. Co., 5 Wis.2d 84, 89, 92 N.W.2d 259 (1958) (citations omitted).

The record speaks very little to what Edna's desires would be under the current circumstances. We know from the record that she was a vibrant woman, a gifted journalist, and a devout Roman Catholic. We know that she was and is loved dearly by her family and friends, and that the majority of them feel that she "would not want to be kept alive" in this condition. We know that in 1966 or 1967 during a time of family crisis, she said that she "would rather die of cancer than lose [her] mind." But we do not have any clear statement of what her desires would be today, under the current conditions. Her friends and family never had any conversations with her about her feelings or opinions on the withdrawal of nutrition or hydration, and she did not execute any advance directives expressing her wishes while she was competent.

There is a presumption that continuing life is in the best interests of the ward. L.W., 167 Wis.2d at 86, 482 N.W.2d 60. The only evidence in the record of Edna's desires is the general statement she made to her sister in 1966 or 1967. We understand how difficult Edna's illness has been on her loved ones, and we sympathize with their plight, but the evidence contained in the record is simply not sufficient to rebut the presumption that Edna would choose life. A perusal of the record and the insufficiency of the evidence contained therein supports the result the trial court reached, even though there was no explicit factual finding by the trial court on this issue.

In conclusion, this court declines to extend the scope of L.W. beyond those incompetent wards who are currently in a persistent vegetative state; we will not apply L.W. to those with incurable or irreversible conditions.

As such, we re-affirm the decision of this court in L.W. that the threshold at which this court will authorize the withholding or withdrawal of life-sustaining medical treatment is the point at which trained medical doctors diagnose a patient as being in a persistent vegetative state.

Whether or not a patient is in a persistent vegetative state is a medical, not legal, determination. If Edna M.F.'s doctors determine she is now in a persistent vegetative state and the guardian determines that it is in the best interest of Edna, she may be authorized to withhold nutrition and hydration. As it now stands, however, the facts of this case do not support a finding that Edna M.F. is in a persistent vegetative state. That is the rule of L.W. and we decline to extend that rule.

Consequently, we hold that a guardian may only direct the withdrawal of life-sustaining medical treatment, including nutrition and hydration, if the incompetent ward is in a persistent vegetative state and the decision to withdraw is in the best interests of the ward. We further hold that in this case, where the only indication of Edna's desires was made at least 30 years ago and under different circumstances, there is not a clear statement of intent such that Edna's guardian may authorize the withholding of her nutrition.

The decision of the Wood County Circuit Court is affirmed.

SHIRLEY S. ABRAHMSON, Chief Justice (concurring).

I join in the mandate. I agree that In the Matter of Guardianship of L.W., 167 Wis.2d 53, 482 N.W.2d 60 (1992), should not be extended to persons not in a persistent vegetative state.[1]

[1] The guardian, the guardian ad litem, the two amici and counsel appointed by this court to support the order of the circuit court

I write separately because I believe (1) that the majority opinion's characterization of Ms. F.'s condition is incomplete and (2) that further discussion of the application of L.W. to the present case is needed.

I.

I write first to explain my disagreement with the majority opinion's characterization of some parts of the record.

The majority's discussion of Ms. F's condition does not do justice to the factual record. The majority describes Ms. F. as bedridden, responsive to stimulation and appearing alert at times. Majority op. at 487. While this description is true, it conveys an inaccurate picture of Ms. F.'s medical situation. Ms. F. breathes without assistance but in all other respects is dependent on others for her care and continued existence. Ms. F.'s muscles have deteriorated to the point where her limbs are contracted and immobile. She demonstrates no purposeful response, such as withdrawal, to tactile, aural or visual stimuli; she makes non-specific responses to pinching or tapping of the arm or sternum. There is also some testimony suggesting

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agree that at the time of the hearing Ms. F. was not in a persistent vegetative state. The guardian and guardian ad litem would have preferred that the attending doctor opine that Ms. F. was in a persistent vegetative state because the guardian could then have directed the withdrawal of nutrition without authorization from the court if two independent physicians concurred in the diagnosis. Yet the guardian accepted the diagnosis of Ms. F.'s attending doctors at that time.

Because of the attending doctor's diagnosis, the guardian, the guardian ad litem and the amici came to court to urge the court to authorize circuit courts to confirm a guardian's decision to direct withdrawal of nutrition from a person not in a persistent vegetative state. Thus counsel urge us to extend In the Matter of Guardianship of L.W., 167 Wis.2d 53, 482 N.W.2d 60 (1992). Court-appointed counsel urges us to adhere to L.W.

The amici curiae are the Elder Law Center of the Coalition of Wisconsin Aging Groups and the Board on Aging and Long Term Care of the State of Wisconsin. Each filed a brief.

Ms. F. occasionally may track movements in the room with her eyes.

Two attending physicians testified; only Dr. Erickson, however, was asked to opine on whether Ms. F. was in a persistent vegetative state at the time of his examination of her. Dr. Erickson testified as follows:

> The definition [of persistent vegetative state] as described in the journal of neurology in 1989, January, 1989, requires that there be no behavioral response whatsoever over an extended period of time, and that no voluntary action or behavior of any kind is present. As I testified before, Edna, in my opinion, has provided evidence of some minimal response to stimulation from her surrounding, and so in the strict definition, I would have to say that she approximates but does not entirely meet that definition of the persistent vegetative state.

R. 19 at 33.

The circuit court made the following finding of fact, in accord with the guardian's position and the evidence presented: "Edna M.F. is a 71 year old woman whose mental condition approximates but does not meet the clinical definition of persistent vegetative state." Given the record in this case the circuit court's findings that Ms. F. is not in a persistent vegetative state is not clearly erroneous.[2]

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[2] The majority opinion embellishes the record when it concludes that Ms. F. could "likely feel the pain and discomfort of starving to death." Majority op. at 490. Dr. Erickson testified that in his opinion Ms. F. was not experiencing any pain. R. 19 at 34, 51-52. Dr. Przbylinski testified that he thought Ms. F. could experience pain but that a physician could not determine this fact. R. 19 at 63, 68-69. The circuit court made no finding, expires or implied, regarding whether Ms. F. retains sufficient cortical function to feel pain. Retention of the feeding tube would enable the clinic staff to continue to provide Ms. F. with fluids and, if deemed necessary, with pain medication, while nutrition was withheld.

The other important factual question is whether Ms. F. made a clear expression of her wishes regarding life-sustaining medical treatment. I agree with the majority opinion that the record supports the finding that she did not and the circuit court's memorandum decision implies such a finding. That finding is not clearly erroneous.

II.

I have some concern about the majority opinion's characterization of several aspects of the L.W. decision.

L.W. largely controls our decision in the present case. L.W. held that a guardian may consent to the withholding or withdrawal of life-sustaining medical treatment on behalf of one who was never competent, or a once competent person whose conduct was never of a kind from which one could draw a reasonable inference upon which to make a substituted judgment,[3] when: (1) the attending physician and independent physicians determine with reasonable medical certainty that the patient is in a persistent vegetative state and has no reasonable chance of recovery to a cognitive and sentient life; and (2) the guardian determines in good faith that the withholding or withdrawal of treatment is in the ward's best interests. L.W., 167 Wis.2d at 84-85, 482 N.W.2d 60.

I feel it necessary to state what I believe L.W. does and does not stand for and to offer further discussion of the application of L.W. to the facts of this case.

First, L.W. held that a person's right to refuse life-sustaining medical treatment includes the right to refuse the provision of nutrition and hydration. L.W., 167 Wis.2d at 70-73, 482 N.W.2d 60.[4] It is therefore of no

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[3] I agree with the majority opinion that the ward in the present case had not made a clear expression, when competent, of her wishes with regard to life-sustaining medical treatment.

[4] Despite the objection raised in the dissenting opinion in L.W., 167 Wis.2d at 99, 482 N.W.2d 60 (Steinmetz, J., dissenting), the

moment that the United States Supreme Court "merely assumed" this fact in Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 221 (1990), as the majority opinion states. Majority op. at 488 n. 4. There is no longer any doubt that the provisions of nutrition and hydration by artificial means are forms of medical treatment in Wisconsin.

Second, L.W. held that a surrogate decision maker must apply a best interests test to determine the propriety of withholding life-sustaining medical treatment to a person who was never competent or a person whose conduct while competent was never of a kind from which one could draw a reasonable inference upon which to make a substituted judgment. L.W. 167 Wis.2d at 75-76, 482 N.W.2d 60. L.W. did not establish whether a substituted judgment test or other test is appropriate to determine the propriety of withholding life-sustaining medical treatment from a person who gave indication while competent of his or her wishes regarding such treatment. Nor did L.W. address the proper test to be used when the incompetent person is not in a persistent vegetative state. L.W. was concerned with a person in a persistent vegetative state who by all indications had never been competent. There was, therefore, no basis on which a guardian or a court

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court concluded its thorough consideration of the issue as follows: "Consistent with the implied holding of the United States Supreme Court, and the specific declaration of the Wisconsin legislature, we conclude that an individual's right to refuse unwanted life-sustaining medical treatment extends no artificial nutrition and hydration." L.W., 167 Wis.2d at 73, 482 N.W.2d 60. In response to the dissenting opinion the L.W. majority stated:

> The dissent asserts that this conclusion is 'unwarranted and misconceived' because Cruzan did not decide the issue. . . . It is clear that we base our conclusion that artificial nutrition and hydration is medical treatment which may be refused primarily on the fact that it is indistinguishable from other forms of treatment and not on the ambivalence of the Cruzan majority.

Id. at 73 n. 7, 482 N.W.2d 60.

could make a substituted judgment and only under such circumstances did the court rule out a substituted judgment test. L.W. 167 Wis.2d at 78-79 and n. 11, 482 N.W.2d 60. It would be inaccurate to conclude that the substituted judgment test has been rejected in other circumstances.

I take the majority opinion to imply that L.W. rejected the substituted judgment test for all persons in a persistent vegetative state:

> Noting that this court has rejected the substituted judgment standard in the past [citing In re Guardianship of Pescinski, 67 Wis.2d 4, 7-8, 226 N.W.2d 180 (1975) and In re Guardianship of Eberhardy, 102 Wis.2d 539, 566-67, 307 N.W.2d 881 (1981)] and that the clear and convincing evidence standard would be too strict, this court [in L.W.] concluded that an objective "best interests" standard was the appropriate standard to apply when deciding whether to withdraw life-sustaining medical treatment from an incompetent ward in a persistent vegetative state. [L.W., 167 Wis.2d] at 76, 78, 81, 482 N.W.2d 60. The only thing that matters in the decision-making process is what would be in the ward's best interests.

Majority op. at 489. But the court in L.W., having considered the two cases cited by the majority opinion in the present case, Pescinski and Eberhardy, stated explicitly that substituted judgment may be the appropriate test in some circumstances:

> [N]either of these cases should be construed to mean that a surrogate decision maker could not make a substituted judgment or decision that was designed to carry out the wishes of the incompetent if the incompetent's wishes were knowable. . . . To hold that all substituted judgments are ipso facto rejected would probably constitute an unconstitutional holding for it would deprive an incompetent of the con-

> stitutional right of choice a right that is universally recognized when the choice is ascertainable.

L.W., 167 Wis.2d at 79 n. 11, 482 N.W.2d 60.

The court has no reason to address the appropriate test in the present case because according to the record Ms. F. was not in a persistent vegetative state and her wishes were not knowable. The majority opinion therefore should not be read to change or add to L.W.'s limited statement regarding the appropriate test for a court or guardian to apply in determining the propriety of withholding life-sustaining medical treatment.[5]

Third, pursuant to L.W., the court's ruling today is limited to Ms. F.'s condition in the spring of 1995. The decision whether to seek additional diagnoses when this case is completed properly belongs to the guardian and not to the court. It is a fundamental premise of L.W. that ordinarily decisions to withhold or withdraw life-sustaining medical treatment of a ward are to be made by a guardian in conjunction with doctors and the family, not by the courts. As L.W. stated, courts are poorly equipped to handle these matters. L.W., 167 Wis.2d at 92, 482 N.W.2d 60.

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[5] For discussions of the substituted judgment and best interests tests see John A. Robertson, Cruzan and the Constitutional Status of Nontreatment Decisions for Incompetent Patients, 25 Ga. L.Rev. 1139 (1991); Yale Kamisar, When is there a Constitutional "Right to Die"? When is there no Constitutional "Right to Live"?, 25 Ga. L.Rev. 1203 (1991); John A. Robertson, Assessing Quality of Life: A Response to Professor Kamisar, 25 Ga. L.Rev.1243 (1991); Stewart G. Pollock, Life and Death Decisions: Who Makes Them and By What Standards?, 41 Rutgers L.Rev. 505 (1989); Nancy K. Rhoden, Litigating Life and Death, 102 Harv. L.Rev. 375, 380 419 (1988); Joanna K. Weinberg, Whose Right Is It Anyway? Individualism, Community, and the Right to Die: A Commentary on the New Jersey Experience, 40 Hastings L.J. 119 (1988); Rebecca Morgan, Florida Law and Feeding Tubes The Right of Removal, 17 Stetson L.Rev. 109 (1987).

If the guardian chooses to seek further diagnoses and if the doctors, applying current medical knowledge, determine that Ms. F. is at the time of examination in a persistent vegetative state, the guardian may consent to withdrawal of nutrition or the guardian may decide not to withdraw nutrition. In either event, no further circuit court proceeding is available or required unless an interested person objects to the withdrawal of nutrition.

The diagnosis of a persistent vegetative state or its absence is made by qualified physicians using scientifically current information and standards. Guardians and doctors must be allowed to adopt the medical community's most advanced thinking on the subject.[6] It is similarly important that physicians who are called upon to make the apparently difficult diagnosis of a persistent vegetative state be expert in this area of medicine. Court review of the guardian's determination is necessary only if a party in interest objects. L.W., 167 Wis.2d at 92-93 and n. 20, 482 N.W.2d 60.

Fourth, the holding in L.W. should be understood to state the principle that the fact that the ward is in a persistent vegetative state is a significant legal threshold.

Under L.W. the opinion of an attending physician is essential for the withdrawal of nutrition. Dr. Erickson, one of the attending physicians, was an internist, had extensive experience with older persons including treating Alzheimer's patients, and held a certificate of added qualifications in geriatrics. While the guardian and guardian ad litem believe that withdrawal of life-sustaining treatment for Ms. F. is appropriate, they relied on the diag-

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[6] Unlike the other concurring opinion I do not believe this court should determine the differences, if any, between the 1994 and earlier medical standards about persistent vegetative state and the appropriate medical diagnosis of persistent vegetative state without the assistance of experts' testimony and without briefing by the parties.

nosis of Ms. F.'s attending physicians, as they were required to do under L.W.

When the attending physician did not diagnose Ms. F. as in a persistent vegetative state, there was no point in consulting independent physicians. The issue of who should be the independent physicians to diagnose Ms. F.'s condition is thus not raised in this case and has not been briefed by the parties. Furthermore, L.W. does not address the difficult question of what procedure should be followed when there is disagreement among the consulted physicians whether the patient is in a persistent vegetative state. Again, this question is not raised or briefed in this case.

To the extent it may be necessary or appropriate for the court to change, add to, or expand upon the standards set forth in L.W., the court should do so only with the benefit of full adversarial briefing in a case presenting a real controversy framed by adversarial parties. See, e.g., State v. Garfoot, 207 Wis.2d 215, 239, 558 N.W.2d 626 (1997) (Bablitch, J., concurring).

I view L.W. as the first step in addressing withdrawal of life-sustaining medical treatment from persons in a persistent vegetative state who have not clearly expressed their wishes. As is evident in this case, L.W. has not answered all the questions that will be raised in this complex and troubling area. I have tried to take care, however, not to use the present case as the vehicle to offer answers to unresolved complex questions that have been neither raised nor briefed. I am concerned that I not engage in appellate decision making of the sort Attorney Bernard Witkin has characterized as "Have Opinion, Need Case." B.E. Witkin, Manual on Appellate Court Opinions § 86 at 155 (1977).

Fifth, L.W. commented favorably on the role of the health care provider's ethics committee.[7] Hospital or nurs-

[7] L.W., 167 Wis.2d. at 89, 482 N.W.2d 60. For a discussion of the role of ethics committees see Gregory A. Jaffe, Institutional

ing home ethics committees provide an important forum for careful deliberation about the decision to withhold life-sustaining medical treatment. Based on the limited record before us, it appears that the committee reviewing the request by Ms. F.'s guardian did not function effectively. Had Ms. F. been in a persistent vegetative state and had an interested person objected to the withdrawal of nutrition, the circuit court stated that it would have been unable to give weight to the committee's purported determination that withholding of nutrition was the ethically proper course. The circuit court noted that no formal minutes or report of the meeting was produced at the hearing and that the committee members apparently functioned without either a shared body of rules or training in ethics. In fairness to the committee members in this case, it must be noted that the committee had only recently been formed and had deliberated in perhaps only one other case.

The circuit court also seemed troubled, as am I, with the apparent focus of the ethics committee's investigation. The committee seemed to understand that its function was to reach a determination that would insulate the facility from legal liability rather than the determination that best comported with medical ethics.[8] The focus of all par-

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Ethics Committees' Legitimate and Impartial Review of Ethical Health Care Decisions, 10 J. Legal Medicine 393 (1989).

[8] The ethics committee apparently agreed with the decision to withhold nutrition from Ms. F. but would not agree to carry out this decision without written consent from all family members. It appears that all family members except for one niece of Ms. F. consented in writing. The niece was reported to have said that she did not object to withholding nutrition but that her religious views precluded her from consenting in writing.

The circuit judge concluded his own lengthy questioning of one member of the ethics committee with the following: "[T]he way I understand it, what you really have is a liability problem, and that's why you want everybody to consent, is that correct?" Dr. Erickson answered: "That is correct." R. 19 at 47.

ticipants in this fateful and difficult process should be on the propriety of taking action which will lead to a person's death. The health care facility's liability concerns must not be allowed to interfere with the guardian's efforts to assure the exercise of the ward's right to be free of unwanted life-sustaining medical treatment when the guardian has determined, in consultation with the physicians, that the ward is in a persistent vegetative state and it is in the ward's best interests to withhold such treatment.

For the foregoing reasons I write separately.

WILLIAM A. BABLITCH, Justice (concurring).

The medical determination of the existence of a persistent vegetative state is, literally, one of life or death. It is important the doctors get it right. It is equally important that we get the law right.

The majority and the concurring opinions, and this writer, agree that if a person is not in a persistent vegetative state, medical treatment cannot be withdrawn.

We further agree that if Ms. F. is diagnosed again and the doctors determine that she meets the current medical definition of persistent vegetative state, medical treatment may be withdrawn even if her physical condition has not changed from the time of the diagnosis rendered in this case.

But then we part company.

Regrettably, the majority and the concurring opinions fail to establish a significant safeguard designed to ensure the accuracy of that determination. They would allow any person with a medical degree to make the critical diagnosis that drives the ultimate decision to withdraw or continue life sustaining medical treatment. Furthermore, they insist on the presence of three doctors only when the decision is to withdraw life sustaining medical support. Respectfully, I cannot join such a decision.

I would direct as a matter of law that anytime a guardian requests a diagnosis for the purpose of determining the presence or absence of a persistent vegetative state in order to ascertain whether life sustaining medical treatment can be withdrawn, three conditions must be met. First, the diagnosis must be made by the attending physician and two independent doctors. Second, at least one of the independent doctors must be a specialist in the medical field relevant to the patient's condition.[1] Third, I join with the concurring opinion that the doctors must rely on current medical authority generally accepted in that specialty. Inasmuch as Alzheimer's is a neurological disease, I would direct that in the case of Ms. F. one of the independent doctors be a neurologist relying on current medical authority accepted in the field of neurological medicine.

I.

The majority and concurring opinions fail to require that one of the attending physicians be a specialist in the medical field relevant to the patient's condition.

This case amply demonstrates the need for such protection. Neither of the two physicians who examined Ms. F. were neurologists. The only doctor who was asked his opinion on whether Ms. F. was in a persistent vegetative state testified she was not. However, he testified that

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[1] Although these two issues were neither briefed nor argued by the parties, the posture in which this case comes to us does raise them. It is obvious from this record that all parties agreed to a trial and appellate strategy of attempting to extend L. W.. Thus, none of the original parties were adversarial to each other, and none of them briefed nor argued these issues. From their perspective, it was unncessary. Nonetheless, I would reach and decide them. We have on occasion in the past ordered the parties to brief issues not presented in the briefs or arguments. We have, as we did in this very case, appointed counsel to advance opposing positions. I would support similar action in this case. The nature of these issues make it highly unlikely that this court will see them again for years, if ever.

his diagnosis was based on a January 1989 article in the medical journal, Neurology. The authority he relied on was arguably outdated.

The entire 1989 Statement upon which the doctor relied covered two pages in that journal. In 1991, the Multi-Society Task Force on Persistent Vegetative State was created.[2] The Task Force's 1994 Statement, a far more exhaustive treatment of persistent vegetative state, summarizes current knowledge of the medical aspects of persistent vegetative state.[3] The 1994 Statement explains, refines and substantially augments the 1989 definition of persistent vegetative state applied by Ms. F.'s doctor in his diagnosis.

As more fully discussed below, the 1994 Statement appears to call into serious question the accuracy of the diagnosis made by Dr. Erickson.

Unless this court directs that at least one of the doctors be a specialist current in his or her field, there is nothing to stop this from happening again. The potential for seri-

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[2] The 1994 Statement, Medical Aspects of the Persistent Vegetative State, Parts I and II, 330 N.Engl. J. Med (May 26, 1994), was approved by the executive committee of each of the following medical societies: the American Academy of Neurology, the Child Neurology Society, the American Neurological Association, the American Association of Neurological Surgeons, and the American Academy of Pediatircs. Two representatives from each of these societies were appointed to the Task Force, and an advisory panel of consultants was selected from the related fields of medicine, ehtoics, and law.

[3] The 1994 Statement speaks to the "vegetative state," distinguishing between a "persistent vegetative state" and a "permanent vegetative state." It refers to the persistent vegetative state as a diagnosis, the permanent vegetative state as a prognosis, i.e., an irreversible persisent vegetative state. L.W. used the term persistent vegetative state to refer to an irreversible condition. Because the majority and concurring opinions continue to use the term "persistent" to categorize the irreversible condition, I do likewise.

ous error, as possibly occurred here where Ms. F. was diagnosed as not being in a persistent vegetative state, is patent. The potential for serious error in cases involving a patient diagnosed as being in a persistent vegetative state is equally apparent.

In retrospect, L.W. should have insisted upon, rather than recommended, a specialist in the field. It did not, and the majority and concurring opinions continue in that error. In a justifiable desire to leave these decisions as much as reasonably possible to family members and their physicians and not the courts, the majority and concurring opinions abdicate too much. They are willing to allow any person with a medical degree to diagnose the presence or absence of a persistent vegetative state.

I am not.

A diagnosis of the presence or absence of a persistent vegetative state drives the ultimate decision to withdraw or continue life sustaining medical treatment. It is far too important and critical a decision to leave in the hands of anybody with a medical degree. A level of expertise beyond a medical degree should be demanded.

Other states and commentators have recognized this problem. One legal scholar cites the risk of an erroneous medical diagnosis as one of the three major factors that contribute to the risk of an improper decision to continue or to withhold life sustaining medical treatment. Linda C. Fontiman, Privacy and Personhood Revisited: A New Framework for Substitute Decision Making for the Incompetent, Incurably Ill Adult, 57 Geo. Wash. L.Rev. 801, 808 (March 1989). Professor Fontiman rules that a number of courts have implicitly recognized this possibility of a mistaken diagnosis. Id. at 809.

The New Jersey Supreme Court, which set the stage for decision making analysis in these cases with the Quin-

lan decision, expressly recognized the risk of an erroneous diagnosis. In re Jobes, 108 N.J. 394, 529 A.2d 434, 447-448 (1987). To guard against the risk of such an error and to ensure the preservation of medical ethics, the surrogate decision maker must secure statements from "at least two independent physicians knowledgeable in neurology that the patient is in a persistent vegetative state." Id. 529 A.2d at 448.

Acknowledging that the prognosis determination is a medical one, the Washington Supreme Court held that even this prong of the life-sustaining medical treatment decision making process must incorporate safeguards to protect patients from an inaccurate diagnosis. In re Colyer, 99 Wash.2d 114, 660 P.2d 738, 749 (1983) (requiring confirmation of the attending physician's diagnosis by a prognosis board consisting of "no fewer than two physicians with qualifications relevant to the patient's condition"). Accord In re Moorhouse, 250 N.J.Super. 307, 593 A.2d 1256 (App. 1991) (requiring that the attending physician's diagnosis be confirmed by the hospital's prognosis committee and at least two independent physicians knowledgeable in neurology); John F. Kennedy Memorial Hospital, Inc. v. Bludworth, 452 So.2d 921, 926 (Fla.1984) (requiring certification that patient is in a permanent vegetative state by the primary treating physician and concurrence in the certification by "at least two other physicians with specialties relevant to the patient's condition.").

The concurring opinion recognizes to some extent these problems by stating that "It is similarly important that physicians who are called upon to make the apparently difficult diagnosis of a persistent vegetative state be expert in this area of medicine." Concurrence at 495.

It is more than "important." It is critical. I would not recommend, I would direct. The absence of this safeguard in the majority and concurring opinions charts a perilous course.

Dr. Erickson, who is not a neurologist, relying on arguably outdated medical authority, diagnosed Ms. F. and testified that she approximates but does not meet the strict definition of persistent vegetative state. If he was in error, important constitutional rights were denied Mrs. F. This record raises serious concern in my mind that he may have been in error. At the very least, his testimony did not indicate a knowledge of the 1994 Statement. A neurologist might well have been aware. It might have changed the diagnosis.

Nevertheless, if there was an error made in the diagnosis of Ms. F., or others like her, it was an error made on the side of life. It can be corrected. Not so in the case of a diagnosis of a persistent vegetative state of a person who is in fact not in a persistent vegetative state. Once medical treatment is withdrawn, life will cease: misdiagnosis in that event cannot be corrected. Surely some minimum safeguards speaking to the expertise and knowledge of the doctors should be present. The majority requires nothing other than a medical degree.

I would require more.

II.

Unfortunately, the majority and concurring opinions require three doctors only when life sustaining support is to be withdrawn. They are silent as to the threshold stage in any case involving these issues: the decision of the guardian to seek a diagnosis.

I would require three doctors anytime a guardian requests a diagnosis for the purpose of determining the presence or absence of a persistent vegetative state. The importance of that requirement is demonstrated by this case. Once the attending physician determined that Ms. F. was close but not actually in a persistent vegetative state, the inquiry was ended. But if Ms. F. was incorrectly diagnosed, as I believe is suggested in this record, important constitutional rights were denied her.

We require three doctors when the decision to withdraw life support is made. Is it not equally important to require the same number of doctors at the threshold inquiry which, in a case like this, is determinative of constitutional rights?

I would require that once the guardian determines that the question of withdrawal of life sustaining medical support is presented, the attending physician and two independent doctors must be consulted.

III.

Fortunately, the concurring opinion recognizes the importance of using current medical authority, and directs that it be used. Concurrence at 494 ("If the guardian chooses to seek further diagnoses and if the doctors, applying current medical knowledge, determine that Ms. F. is at the time of the examination in a persistent vegetative state, the guardian may consent to withdrawal of nutrition or the guardian may decide not to withdraw nutrition." (emphasis added)). Id. at 494-495 ("Qualified physicians make the diagnosis of a persistent vegetative state or its absence, using scientifically current information and information and standards." (emphasis added)). I join that part of the concurring opinion. Accordingly, that requirement has the support of a majority of this court.

The importance of using current medical authority is amply demonstrated in this record. Dr. Erickson, relying on a January, 1989, journal of neurology, testified that the standards expressed therein required "that there be no behavioral response whatsoever over an extended period of time." (emphasis added). Further, he testified that those 1989 standards required there be "no voluntary action or behavior of any kind [present]." (emphasis added). Because there was "some minimal response to stimulation from her surroundings" the doctor concluded Ms. F. "approximates but does not entirely meet that definition of the persistent vegetative state."

This testimony was crucial. No one disputed the doctor's finding that Ms. F. was not in a persistent vegetative state. The circuit court had no choice but to agree. But current medical authority, the 1994 Statement, contradicts or at the very least calls into serious question Dr. Erickson's conclusion. It does not require, "no behavioral response whatsoever" to the presence of a persistent vegetative state; rather, it requires no evidence of "sustained" behavior of that kind.

In order to more fully understand why the 1994 Statement seriously undercuts the doctor's conclusion, it is necessary to first understand more completely the condition of Ms. F. with respect to her response to stimulation.[4]

Although she appears to respond to voices or noises in her room, she makes no meaningful response to questions or commands. R:19 at 24-25.[5] Several medical professionals who had regular contact with Ms. F. described her condition. Licensed practical nurse, Patricia Rohmeyer (Rohmeyer), has had regular contact with Ms. F. since 1986. R:19 at 6. Rohmeyer testified that she "[d]oes not respond most of the time when you speak to her, either by blinking her eyes or opening her eyes." R:19 at 7. Edna F. does not respond when Rohmeyer places a finger in her hand and asks her to squeeze the finger. R:19 at 8. When asked whether Ms. F. looked toward a person who called her name, Rohmeyer responded that "[s]he wasn't able to today." R:19 at 8. She described Ms. F.'s condiiton as "progressive through the years." R:19 at 8.

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[4] I agree with the concurring opinion that the majoirty opinion does not convey an accurate picture of Ms. F.'s condition. The facts recited in the concurring opinion together with the facts stated herein convey an accurate portrayal. In addition, I note that Ms. F. has been in this condition since 1993, and her doctors testify she will not improve, she will only get worse.

[5] References are to pages and documents in the record.

Spahn described her sister's condition to the circuit court: "Sometimes I can get her to look at me. . . . Sometimes I can get her to look. Not very often. The last couple times I have been in I've gotten—I did get her to open her eyes, but not to look at me." R:19 at 75-76.

Even more telling was the testimony of Dr. Erickson. He described Ms. F.'s condition on December 19, 1994:

> She did respond to voice by opening her eyes, but did not respond to command. . . . She opened her eyes and looked, but not in any meaningful way at me. She simply appeared to respond to a voice or to a noise in the room. I discussed with the nursing staff at that time, although I did not notice that she would occasionally track movement in the room. The level of alertness that I found at that time in discussion with the nursing staff was consistent with what they had observed on a day to day basis. . . . Periodically she would follow movement in the room, or she may respond to tactile stimulation or voice by opening her eyes. But there was no meaningful response to command or attempts at communication.

R:19 at 24-25.

The record reveals that upon application of mildly noxious stimuli, Ms. F. might open her eyes or grimace but, her doctors say, she fails to make a consistent effort to withdraw from or to remove the stimulation. R: 19 at 26, 65.

Dr. Przyblinski described Ms. F.'s response to mildly noxious stimuli: "When I gave her tactile stimulation which I considered mildly noxious, either pinching her for arm [sic] or her leg or rubbing her sternum, she grimaced and she did make a moaning sound. She did not make any attempt to push my hand away or pull her arm or leg away, so I didn't see anything that I would see as purposeful movement with that kind of stimulation." R:19

at 63. He further states that she is no longer aware of, nor can she interact in any purposeful manner, with her surroundings, or the people who are attending to her. R:19 at 64-65 (emphasis added).

Dr. Erickson has never observed a consistent effort by Ms. F. to withdraw from noxious stimuli. R:19 at 25. When he touches her face, or presses gently on her sternum, she might make a minimal response, i.e., a movement or facial expression, acknowledging the stimulation, but he has observed no consistent effort to withdraw or to remove the stimuli. R:19 at 26. When doctors subject her to noxious stimuli, Ms. F.'s vital signs remain stable. R:19 at 34.

The 1994 Statement lists the following criteria according to which the vegetative state can be diagnosed:

> (1) no evidence of awareness of self or environment and an inability to interact with others; (2) no evidence of sustained, reproducible, purposeful, or voluntary behavioral responses to visual, auditory, tactile, or noxious stimuli; (3) no evidence of language comprehension or expression; (4) intermittent wakefulness manifested by the presence of sleep-wake cycles; (5) sufficiently preserved hypothalamic and brain-stem autonomic functions to permit survival with medical and nursing care; (6) bowel and bladder incontinance; and (7) variably preserved cranial-nerve reflexes (pupillary, oculocephalic, corneal, vestibule-ocular, and gag) and spinal reflexes.

Dr. Erickson testified that a persistent vegetative state required "no behavioral response whatsoever." As seen from the above 1994 Statement, that appears to be an incorrect conclusion: "no evidence of sustained, reproducible, or voluntary behavioral responses to . . . stimuli." (emphasis added). The 1994 Statement further cautions that motor or eye movements and facial expressions in response to various stimuli also occur in persons in an

irreversible vegetative state. These movements and expressions occur in stereotyped patterns that indicate reflexive responses integrated at deep subcortical levels, and are not indicative of learned voluntary acts. The presence of these responses is consistent with complete unawareness. The 1989 Statement does not discuss the subtle distinctions between the visual pursuit of a person who is aware of the surroundings and a person in a persistent vegetative state.

Given that Dr. Erickson believed the existence of a persistent vegetative state required no behavioral response whatsoever, given that he testified Ms. F.'s responses were "minimal," and given the above quoted texts from the 1994 Statement, I conclude a serious question exists as to the accuracy of his diagnosis. If so, important constitutional rights have been denied Ms. F. The use of current medical authority might well have changed his diagnosis. Fortunately, that is now the mandate of this court.

In summation, I would hold that any time a guardian requests a diagnosis for the purpose of determining the presence or absence of a persistent vegetative state to ascertain whether life sustaining medical treatment may be withdrawn, three conditions must be met: 1) the diagnosis must be made by the attending physician together with two independent doctors; 2) at least one of the independent doctors must be a specialist in the medical field relevant to the patient's condition; and, 3) the diagnosis must rely on current medical authority generally accepted in that specialty.

If indeed Ms. F.'s original diagnosis was incorrect, needless suffering has been endured by her family and loved ones as they have been forced to sit helplessly by watching this woman they love continue an emptiness that only the most literal would call life. Had the procedures I recommend been utilized, this might have been avoided. For-

tunately, if error has been made it can be corrected. All members of this court agree that she can be re-diagnosed. If her attending physician and two independent doctors agree that she meets the current medical definition of persistent vegetative state, and no one objects, medical treatment may be withdrawn without further recourse to the courts. This is so even if her physical condition has not changed from the time of the original diagnosis rendered in this case.

Others may not be as fortunate.

For the above stated reasons, I respectfully concur.

JANINE P. GESKE, Justice (concurring).

I join both the majority opinion authored by Justice Donald W. Steinmetz and the concurring opinion authored by Chief Justice Shirley S. Abrahamson.

ANN WALSH BRADLEY, Justice (concurring).

I join both the majority opinion authored by Justice Donald W. Steinmetz and the concurring opinion authored by Chief Justice Shirley S. Abrahamson.

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[6] I also agree with the concurring opinion with respect to its discussion of what L.W. does and does not stand for, specifically that the provision of nutrition and hydration by artificial means are forms of medical treatment in Wisconsin, and that the substituted judgment test has not been rejected in Wisconsin in all circumstances.

OFFICE OF THE CLERK
SUPREME COURT
MADISON, WISCONSIN 53701-1688

November 20, 1996

No. 95-2719

IN MATTER OF GUARDIANSHIP AND PROTECTIVE PLACEMENT OF EDNA M.F.:
SPAHN V. WITTMAN
L.C. #93PP36

ORDER

A motion to enlarge the time for oral argument and to realign the guardian ad litem as an appellant rather than a respondent having been filed by the respondent-designate, Howard B. Eisenberg and considered by the court;

IT IS ORDERED that the motion to realign the guardian ad litem as an appellant rather than a respondent is granted; and

IT IS FURTHER ORDERED the motion to enlarge the time for oral argument is denied. The attorneys for the guardian and guardian ad litem shall share 30 minutes of oral argument time as they see fit.

MARILYN L. GRAVES
Clerk of Supreme Court

OFFICE OF THE CLERK
SUPREME COURT
MADISON, WISCONSIN 53701-1688

September 19, 1996

IN THE MATTER OF THE GUARDIANSHIP AND PROTECTIVE PLACEMENT OF EDNA M.F., INCOMPETENT:
BETTY SPAHN v. MARK WITTMAN
#95-2719

ORDER

The Court having reviewed the briefs filed by the parties in the above matter and having determined that proper consideration of the issues presented require briefing and oral argument in support of the circuit court decision on appeal.

IT IS ORDERED that Howard B. Eisenberg is appointed as respondent-designate to appear in this proceeding in support of the decision of the circuit court on appeal.

IT IS FURTHER ORDERED that this case is removed from the schedule for oral argument on October 17, 1996.

IT IS FURTHER ORDERED that within 30 days of the date of this order, the respondent-designate shall file a brief in compliance with Rule 809.19.

IT IS FURTHER ORDERED that the parties will be informed in due course of the date and time this matter is rescheduled for oral argument.

MARILYN L. GRAVES
Clerk of Supreme Court

OFFICE OF THE CLERK
SUPREME COURT
MADISON, WISCONSIN 53701-1688

April 16, 1996

No. 95-2719

IN MATTER OF GUARDIANSHIP AND PROTECTIVE PLACEMENT OF EDNA M.F.:
SPAHN *v.* WITTMAN
L.C. #93PP36

The court having considered the petition to bypass the court of appeals submitted on behalf of appellant-petitioner, Betty Spahn, in this case.

IT IS ORDERED the petition to bypass is granted and the appeal is accepted for consideration in this court; and

IT IS FURTHER ORDERED that the briefs previously submitted by the parties to the court of appeals may stand as the parties' briefs in this court. The parties shall submit ten additional copies of their briefs within ten days of the date of this order. The parties will be notified of the date and time for oral argument in this appeal in due course.

MARILYN L. GRAVES
Clerk of Supreme Court

[Filed Oct. 4, 1995]

STATE OF WISCONSIN
CIRCUIT COURT
WOOD COUNTY
PROBATE BRANCH

95-2719
Confidential

IN THE MATTER OF THE GUARDIANSHIP AND PROTECTIVE PLACEMENT OF:
EDNA M. F.,
Incompetent

BETTY SPAHN,
Guardian of Edna M. F.,
App.

v.

MARK WITTMAN,
Guardian Ad Litem for Edna M. F.,
Resp.

NOTICE OF APPEAL

File No.: 93PP36

Classification Code. 50401

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that the Appellant, Betty Spahn, Guardian of Edna M. Folz, by John R. Hutchinson, appeals to the Court of Appeals, August 22, 1995 in the Circuit Court for Wood County, the Case No. 93-PP-36, wherein the Court denied Appellant's Petition for An Order Confirming Guardian's Decision to Withdraw Artificial Nutrition.

This is not an appeal within Section 752.31(2), Wis. Stats.

This is not an appeal entitled to preference by statute.

Dated this 29th day of September, 1995.

WYNIA & BILLINGS, S.C.

/s/ John R. Hutchinson
JOHN R. HUTCHINSON
State Bar No. 01020212

STATE OF WISCONSIN
CIRCUIT COURT
WOOD COUNTY

Case No. 93PP36

IN THE MATTER OF THE GUARDIANSHIP AND
PROTECTIVE PLACEMENT OF,
EDNA M. F.,
Incompetent.

ORDER

This matter having come on for hearing on March 22, 1995 and April 11, 1995 on a Petition for an Order of the Court confirming the Guardian's decision to withdraw artificial nutrition with appearances by the Petitioner, Wynia & Billings, S.C. by John R. Hutchinson as attorney for the Petitioner and Attorney Mark Wittman as Guardian Ad Litem, this Court finds as follows:

1. Edna M. F. is a 71 year old woman whose mental condition approximates but does not meet the clinical definition of a persistent vegetative state.

2. Edna M. F. is bedridden, incontinent of bowel and bladder, unable to feed herself and unable to move herself or voluntarily change body position. She requires constant repositioning by others to avoid skin breakdown. However, she breaths without assistance, appears to track movement with her eyes and exhibits general non-specific responses to mildly noxious stimuli.

3. In 1979, Edna M. F. was diagnosed with Dementia-Alzheimers type, a progressive and degenerative disease which affects the cerebral cortex and for which there is no known cure. As a direct result of her disease, her mental and physical conditions will continue to deteriorate and, per medical testimony, it is highly unlikely that these conditions will improve.

4. In 1966 or 1967, in the context of a conversation with her sister regarding her mother's treatment for mental depresion vis-a-vis treatment for another woman who was dying of cancer, Edna M. F. stated that she would rather die than lose her mind.

5. The Guardian has urged this Court to apply a "substituted judgment analysis," an analytical process in which the surrogate decision maker attempts to establish, as accurately as possible, what decision the Ward would make under the circumstances if competent to do so. Consideration is given to the Ward's expressed preferences, even if too vague, casual or remote to constitute direct proof, and the Ward's general values, lifestyle and overall manner of living. There is no requirement that the Ward be in a persistent vegetative state. This Court concludes that the application of substituted judgment analysis to extend existing case law must be done by the appellate court or the legislature.

6. In the alternative, the Guardian has urged this Court to apply a "best interest analysis," a separate and distinct balancing test in which the surrogate decision maker evaluates and balances certain objective factors set forth in *In the Matter of Guardianship of L. W.*, 167 Wis. 2d 53, 86, against four specified state interests. Since the Ward is not in a persistent vegetative state, this Court may not authorize the withdrawl of artificial nutrition under the authority of *L. W.*, supra. In addition, this Court knows of no other statutes or case law which will allow it to grant the motion.

WHEREFORE, the Petitioner's request for an order confirming Guardian's decision to withdraw artificial nutrition is denied.

Dated this 22 day of August, 1995.

BY THE COURT:

/s/ Dennis D. Conway
DENNIS D. CONWAY
Circuit Court Judge

[Filed Apr. 19, 1995]

STATE OF WISCONSIN
CIRCUIT COURT
WOOD COUNTY

Case No. 93PP36

IN THE MATTER OF THE GUARDIANSHIP AND
PROTECTIVE PLACEMENT OF,
EDNA M. FOLZ,
Incompetent,

MEMORANDUM DECISION

This matter came on for hearing before the Court on a motion to withdraw nutrition from the ward. Edna Folz is presently 71 years of age, and living at the Marshfield Nursing and Rehabilitation Center. She is suffering from dementia associated with Alzheimer's disease. Ms. Folz was first diagnosed with Alzheimer's in 1979 at Duke University. She was admitted to the Marshfield Nursing and Rehabilitation home in 1986. At that time, she was ambulatory, but was confused and needed direction. She had a short term attention span, and did not always answer appropriately. Today, she is bed-ridden, with a permanent tube attached to her body that provides her nutrition. She can't feed herself, can't turn herself over, and has no control over her bladder and bowels. She does, however, breath on her own. The testimony is clear that she does have some response to stimuli. She can track persons within the room with her eyes. Upon noxious stimulation, pinching and rubbing of the sternum, she grimaces and moans. Her prognosis is that she is very unlikely to improve; that she has reached an end stage of Alzheimer's. However, Dr. Erickson and Dr. Przybylinski have testified that she is not in a persistent vegetative state.

The guardian of Mrs. Folz is her sister, Betty Spahn, who has moved the Court to remove the feeding tube. This motion in concert with the Marshfield Nursing and Rehab Ethics Committee which claims to have decided that the tube should be removed for feeding, but that the hydration tube should not be removed. This Ethics decision is not mentioned in the minutes of the committee meeting. The case for Ms. Folz is not part of the record. The rules or by-laws of the Ethics Committee, if any, are not part of the record. The plan is to allow Ms. Folz to eat what she is capable of taking orally, although it is generally admitted that she will be unable to eat in this fashion. Certainly her inability to eat will cause her death.

The petitioner has provided the Court with letters or affidavits from relatives and former acquaintances, indicating that they feel that from what they knew of her when she had control of her intellect, that she would not care to continue to exist in her present state. None of these witnesses, however, have discussed this matter with Ms. Folz. It is merely their impression of what she would do if she knew about the situation that presently exists.

The only testimony as to Ms. Folz's opinions and feeling on the situation during the time when she had control of her intellectual powers was a conversation with her sister, Betty Spahn, the guardian, in 1966 or 1967. At that time, their mother had just recovered from depression, and Mrs. Spahn's siter-in-law was dying of cancer. In that particular discussion, Mrs. Spahn stated that her sister, the ward here, had stated she would rather be dead than lose her mind. This is the only testimony that refers to anything that Ms. Folz said during her entire lifetime with regard to this situation. That occurred 28 or 29 years ago.

The leading case in the area is In the Matter of the Guardianship of L.W., 167 Wis. 2d 53. That case "is limited in scope to persons in a persistent vegetative state." p. 63 supra.

In *L.W.*, our Court held that court approval of the guardian's decision is not required. Nevertheless, the guardian has requested approval of this Court to withdraw nutrition from Ms. Folz. The guardian ad litem apparently agrees.

In this case, the presumption is that continued life is in the best interests of the ward. ". . . The burden rests upon the guardian to show both the existence of a persistent vegetative state to a high degree of medical certainty and that the decision to withhold or withdraw treatment is in the ward's best interest, and was made in good faith." *In the Matter of the Guardianship of L.W.*, supra p. 92-93.

The evidence is that Ms. Folz is not in a persistent vegetative state. Therefore, this Court cannot grant the motion to withdraw nutrition (which will cause death) under the authority of *L.W.* This Court knows of no other statutory or case law authority which will allow it to grant this motion.

The guardian argues that the Court should use its inherent powers to extend existing case law. She does a substituted judgment analysis and a best interests analysis which argue, in effect, that although a persistent vegetative state does not exist, it is close enough. Such an argument will never end. In view of the life ending result, such change in the law must come from the legislature or the appellate court, not the trial court.

The motion is denied for the above reasons. The attorney for the guardian may draft an order in accord with this opinion.

Dated: April 17, 1995

By the Court:

/s/ Dennis D. Conway
DENNIS D. CONWAY
Circuit Judge

STATE OF WISCONSIN
CIRCUIT COURT
WOOD COUNTY
PROBATE BRANCH

Case No. 93PP36
Classification Code: 301

IN THE MATTER OF THE GUARDIANSHIP OF,
EDNA M. FOLZ,
Incompetent

PETITION FOR ORDER CONFIRMING GUARDIAN'S DECISION TO WITHDRAW ARTIFICIAL NUTRITION

Under oath, I petition the Court for an Order Confirming Guardian's Decision To Withdraw Artificial Nutrition and state as follows:

1. I am the Guardian of Edna M. Folz (hereafter "Ward") under Letters of Guardianship dated June 8, 1993, which Letters remain in full force and effect. A true and correct copy of said Letters is attached hereto and full incorporated herein by this reference.

2. In 1979 Ward was diagnosed as having Alzheimer's disease and has been institutionalized ever since. At that time, statutory recognition of a person's right to refuse life sustaining medical treatment (LSMT) did not exist in Wisconsin and, therefore, Ward never had the opportunity to execute a Living Will (Directive to Physicians) or Power of Attorney for Health Care.

3. Prior to 1979, while still competent, Ward clearly and unequivocally expressed to Petitioner her sincere wish that her life not be artificially prolonged.

4. Ward's current condition is consistent with that of advanced dementia, Alzheimer's type. The position on persistent vegetative state, as outlined by the American Academy of Neurology, indicates that no voluntary action or behavior of any kind is present. There is no behavioral response whatsoever over an extended period of time. Ward approximates, but does not meet, the strict definition of persistent vegetative state in that Ward does express minimal response to stimulation from her surroundings from voice, movement and tactile stimulation. However, this is largely a somatic distinction as in all respects and for all practical purposes, Ward's current condition is consistent with the concept of persistent vegetative state and her primary diagnosis is one that would only progressively bring her closer to that strict definition.

5. The Ethics Committee of the Marshfield Nursing and Rehabilitation Center where Ward is a resident has unanimously concluded that it is appropriate to withdraw artificial nutrition from Ward.

6. The scope of this Petition is limited to the withdrawal of artificial nutrition. Reasonable efforts will be made by personnel at Marshfield Nursing and Rehabilitation Center to feed Ward orally and artificial hydration will be continued indefinitely. The artificial nutrition tube will remain in place for the purpose of ensuring the ability to administer medication if necessary, for Ward's continued comfort.

7. Guardian, as the Petitioner, knows that by withdrawing artificial nutrition, Ward's death is likely to result. However, Guardian, as the surrogate decision-maker for Ward, in the exercise of substituted judgment, and after taking into account Ward's personal, religious and moral beliefs and ethical values relative to the purpose of life, sickness, medical procedures, suffering and death, has determined that Ward would refuse all forms of LSMT which serve only to prolong her continued existence and artificially postpone her death.

8. The following is a list of all interested persons known to Guardian:

   a. Elizabeth (Betty) Folz Spahn, Sister
   1024 Emerson Drive
   Rockford, IL 61108

   b. Walter Folz, Brother
   6916 Lamont Drive
   Lanham, MD 20706

   c. Suzanne Folz Wingo, Sister
   505 W. Church Street
   Morrilton, AK 72110

   d. Betty Ann Folz, Sister-in-law
   14419 Brad Drive
   Rockville, MD 20853

   e. Denise Folz, Niece
   14419 Brad Drive
   Rockville, MD 20853

   f. Cheryl Folz McArthur, Niece
   3551 Kahala Bay Lane
   Las Vegas, NV 89117

   g. Kimberly Folz Perez, Niece
   18317 Lemon Lake Drive
   Olney, MD 20832

h. Marshfield Nursing and Rehabilitation Center
814 W. 14th Street
Marshfield, WI 54449

i. Mark Wittman, Guardian Ad Litem
P.O. Box 9
Marshfield, WI 54449-0009

j. National City Bank, Trustee
P.O. Box 868
Evansville, IN 47705-0868

WHEREFORE, Petitioner prays for an Order of the Court Confirming Guardian's Decision, as the surrogate decision-maker for Ward, to direct Marshfield Nursing and Rehabilitation Center to withdraw artificial nutrition.

Dated this 9th of January, 1995.

By: /s/ Elizabeth Spahn
ELIZABETH SPAHN
Guardian for Edna Folz

[Filed Jun. 8, 1993]

STATE OF WISCONSIN
CIRCUIT COURT
WOOD COUNTY
PROBATE BRANCH

File No. 93PP36

IN THE MATTER OF THE GUARDIANSHIP OF
EDNA M. FOLZ
Alleged Incompetent.

DETERMINATION AND ORDER APPOINTING GUARDIAN AND PROTECTIVE PLACEMENT.

A petition for the appointment of a guardian of the person and estate and for protective placement came on for hearing upon notice/waiver as provided by law.

THE COURT FINDS THAT:

1. The allegations of the petition are true and the ward is in need of a guardian because of infirmities of aging.

2. That Edna Folz, is in need of protective placement because the ward has been determined to be incompetent, has a primary need for residential care and custody, is totally incapable of providing for her own care or custody as to create a substantial risk of serious harm to herself as a result of infirmities of aging, and, other like incapacities.

3. This condition is permanent or likely to be permanent.

4. The least restrictive placement consistent with the ward's needs is in an locked unit in a nursing home.

5. The ward is competent to exercise the right to exercise no rights.

6. Elizabeth S. Folz Spahn is a competent and suitable person to be appointed guardian of the person and estate of the ward.

IT IS ORDERED THAT:

1. Elizabeth C. Folz Spahn is appointed permanent guardian of the person and estate of the ward.

2. Bond in the sum of $2,000. The guardian shall have all the powers of a general guardian.

For Protective Placement only.

3. The ward is protectively placed through the appropriate board designated under Sec. 55.02, Wis. Stats., or its designee.

4. The placement shall be at Marshfield Nursing and Rehabilitation Center or at another facility of equal or less restrictive environment.

5. The placement shall be in an unlocked unit.

Dated this 8th day of June, 1993.

BY THE COURT:

/s/ Dennis D. Conway
DENNIS D. CONWAY
Judge

[Excerpt: Guardian's "Brief in Support of Petition for Order Confirming Guardian's Decision to Withdraw Artificial Nutrition" filed February 16, 1995 in Circuit Court of Wood County, Wisconsin, R. 8-7]

* * * *

One significant issue remains to be addressed. The Wisconsin Supreme Court stressed ". . . that this opinion is limited in scope to persons in a persistent vegetative state." *L. W.* 167 Wis. 2d. 53, 63. Then the Court proceeds to set forth several legal conclusions or rules which are not, and may not be, so restricted.

First, " . . . an individuals right to refuse unwanted medical treatment emanates from the common law right of self-determination and informed consent, the personal liberties protected by the Fourteenth Amendment, and from the guarantee of liberty in Article I, section 1 of the Wisconsin Constitution." *L.W.* Id. at 67.

Second, the Court acknowledges that ". . . the Wisconsin legislature has declared that in this state competent persons have a legislatively sanctioned right to refuse unwanted life-sustaining medical treatment. *L. W.* Id. at 70.

Third, the Court has concluded ". . . that the right to refuse all unwanted life-sustaining medical treatment *extends* to incompetent as well as competent individuals." (emphasis added) *L. W.* Id. at 73.

Finally, the Court stated "We find no reason to differentiate between the rights of the competent and incompetent." *L. W.* Id. at 77.

Can it be said then, reasonably or constitutionally, that this right *"extends"* from competent individuals only to those incompetent individuals in a persistent vegetative state and somehow excludes all other incompetent individuals? The answer must be "No." Otherwise, has not the competent individual lost this right upon becoming

incompetent and then regained the right at such time as the individual is properly diagnosed as being in a persistent vegetative state? Such a conclusion is not logically or legally sustainable.

* * * *

[Excerpts: Guardian's "Appellant Brief" to Wisconsin Court of Appeals filed January 11, 1996 (Brief allowed to stand as briefing to Wisconsin Supreme Court, on bypass), pages 52-55, 61, 63-65.]

* * * *

III. In the alternative, the guardian of the person of Edna M.F., an incompetent ward who is severely ill but not in a persistent vegetative state, as the surrogate decisionmaker, has the authority to direct withholding or withdrawal of medical treatment when such withholding or withdrawal will further Edna M.F.'s best interests.

A. The court may not properly limit the surrogate decisionmaker's authority to use the best interest analysis only to those patients who are in a persistent vegetative state; otherwise, the ability to exercise a valuable fundamental and personal liberty is denied or lost, perhaps forever.

The guardian ad litem has argued that, under the authority of *L.W.*, 167 Wis.2d at 84, the surrogate decisionmaker may apply the best interest analysis and ". . . may consent to the withholding or withdrawal of life-sustaining medical treatment . . . [only] when . . . [the ward] is in a persistent vegetative state and has no reasonable chance of recovery to a cognitive and sentient life . . ." (R 11: 4-5) The court's statement ". . . since the ward is not in a persistent vegetative state, this court may not authorize the withdrawal of artificial nutrition under the authority of *L.W.*" (R 20: 1) indicates that the court agrees with the guardian ad litem. This conclusion is inconsistent with the Supreme Court's earlier conclusion ". . . that the right to refuse all unwanted life sustaining medical treatment extends to incompetents as well as competent individuals . . .," *L.W.*, 167 Wis.2d at 73 and, therefore, may not be upheld. Otherwise, lifelong

incompetents such as the ward in *L.W.* may be forever precluded from exercising their fundamental and personal liberty right to refuse medical treatment.

In Wisconsin, the term "persistent vegetative state" means "a condition that reasonable medical judgment finds constitutes complete and irreversible loss of all of the functions of the cerebral cortex and results in a complete, chronic and irreversible cessation of all cognitive functioning and consciousness and a complete lack of behavioral responses that indicate cognitive functioning, although autonomic functions continue." Section 154.01 (5m), Wis. Stats.

Edna M.F.'s condition approximates but does not meet the strict definition of a persistent vegetative state because Edna M.F. has evidenced some minimal response to mildly noxious stimulation such as grimacing and moaning. (R 19: 33 & 63) However, in all respects and for practical purposes, her current status is consistent with the concept of persistent vegetative state and her primary diagnosis is one that will bring her closer to that strict definition. (R 9).

* * * *

In Wisconsin, if *L.W.* stands for the proposition that the patient must be in a persistent vegetative state before the surrogate may apply the best interest analysis, then life-long incompetents such as the ward in *L.W.* and Joseph Saikewicz and once competent individuals such as Michael Martin and Lucille Austwick may be precluded, perhaps forever, from exercising their fundamental and personal liberty right to refuse unwanted medical treatment unless and until it had been ". . . determine[d] with reasonable medical certainty [by no less than 3 physicians] that the patient is in a persistent vegetative state . . ." *L.W.*, 167 Wis.2d at 84.

* * * *

If this court finds that an alternative to the persistent vegetative state requirement is necessary or advisable, Appellant suggests the court adopt some form the definition of an "incurable or irreversible condition" from Section 40/10, the Illinois Health Care Surrogate Act, 755 ILCS 40/10 (1994) which states as follows:

> "Incurable or irreversible condition" means an illness or injury (i) for which there is no reasonable prospect of cure or recovery, (ii) that ultimately will [directly or indirectly] cause the patient's death even if life-sustaining treatment is initiated or continued, (iii) that imposes severe pain or otherwise imposes an inhumane burden on the patient, and (iv) for which initiating or continuing life-sustaining treatment, in light of the patient's medical condition, provides only minimal medical benefit.

The proposed alternative will preserve the incompetent patient's capability to exercise the right to refuse unwanted medical treatment at any time, prevent premature termination of medical treatment and, at the same time, protect the incompetent patient from the avaricious and opportunistic individual, by providing a definable, yet less rigid, medical test for the best interest analysis. Life-long incompetents, such as the ward in *L.W.* and Joseph Saikewisz, and once competent patients, such as Michael Martin, Lucille Austwick and Edna M.F., will retain the capability to exercise at any time their fundamental and personal liberty right to refuse unwanted medical treatment through their surrogate decisionmaker. Such individuals will not be forced to await a specific and strict clinical diagnosis of persistent vegetative state, a medical condition which the patient may never achieve.

* * * *

Supreme Court, U.S.
FILED
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No. 97-437

In The

Supreme Court of the United States

October Term, 1996

BETTY SPAHN, *Guardian of Edna M. Folz,*

Petitioner,

vs.

MARK WITTMAN, *Guardian ad Litem for Edna M. Folz,* and HOWARD B. EISENBERG, *Respondent-Designate,*

Respondents.

On Petition For Writ Of Certiorari To The Wisconsin Supreme Court

BRIEF IN OPPOSITION OF RESPONDENT-DESIGNATE

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PARTIES TO THE PROCEEDING

The Petition does not accurately reflect all of the parties to the proceedings in the Wisconsin Supreme Court as required by United States Supreme Court Rule 11.6.

After the case was briefed by the Guardian, Guardian *ad Litem*, and two friends of the Court, the Wisconsin Supreme Court ascertained that both parties and both *amici* were urging the Court to reverse the order of the trial court and allow the Guardian to withdraw the feeding tube from the disabled person. Thereafter, on September 19, 1996, the Wisconsin Supreme Court appointed Howard B. Eisenberg "Respondent-Designate" to argue in support of the Circuit Court's order. The Court subsequently granted the Respondent-Designate's motion to realign the parties to make both the Guardian and Guardian *ad Litem* parties-appellant, and the Respondent-Designate the only appellee before the Wisconsin Supreme Court.

Upon motion of the Respondent-Designate, this Court has corrected the caption of this case to reflect the proper parties.

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INTEREST OF RESPONDENT-DESIGNATE

This case was originally set for argument in the Wisconsin Supreme Court on October 17, 1996. However, when that Court determined that both of the parties and both *amici* were urging reversal of the Circuit Court's order and supporting the Guardian's request to allow Ms. Folz to die, on September 19, 1996 the State Supreme Court removed the case from the October oral argument docket, appointed the undersigned as Respondent-Designate, and ordered him to argue in support of the Circuit Court's order.[1] (*See*, Page 36a of the Appendix to the Petition for Writ of Certiorari filed herein). On November 20, 1996 the Wisconsin Supreme Court granted Respondent-Designate's motion to realign the parties to make both the Guardian and Guardian *Ad Litem* parties-appellant and to make him the only respondent in the Wisconsin Supreme Court. (*See*, Page 35a of the Appendix to the Petition for Writ of Certiorari filed herein). Respondent-Designate's interest is assuring that there is a party before the Court who advocates for the decisions of the Wisconsin courts which have refused to allow the Petitioner to withdraw the feeding tube and cause Ms. Folz's death.

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[1] Respondent-Designate is Dean and Professor of Law at Marquette University Law School in Milwaukee, Wisconsin. However, he is appointed in his individual capacity as a member of the Bar, and not in his capacity as Dean, to act as Respondent-Designate. The positions advocated in this brief do not necessarily reflect the position of Marquette University or any of the religious organizations affiliated with Marquette.

STATEMENT OF FACTS

Respondent believes that the following facts are important to this Court's disposition of the instant petition:

- Ms. Folz is not in a persistent vegetative state. Presently she is able to follow movement in the room, she may respond to tactile stimulation or voice by opening her eyes (T. 25)[2], and she will react to a modest level of physical stimulation (T. 25-26).
- Ms. Folz is not now experiencing pain (T. 34).
- Petitioner proposes to remove Ms. Folz' feeding tube, but continue to provide Ms. Folz with hydration.
- Allowing Ms. Folz to starve to death, while continuing to provide her with hydration, will cause her pain and discomfort.
- Ms. Folz has not executed an advance health care directive.
- The state courts made a factual determination that there is no evidence that Ms. Folz ever expressed an opinion of whether she would want to have her life terminated or sustained under the present circumstances.
- The Roman Catholic Church, of which Ms. Folz is a devout member, forbids removal of nutrition under these circumstances.

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[2] The "T" numbers in this brief refer to the pages in the trial transcript of the March 22, 1995 proceedings which is Document 19 in the Record on Appeal.

ARGUMENT

I

THE CONSTITUTIONAL ISSUES RAISED IN THE PETITION WERE NEITHER "PRESSED NOR PASSED UPON" BY THE WISCONSIN SUPREME COURT.

It is the practice of this Court, "when reviewing decisions by state courts, not to decide federal claims that were not 'pressed or passed upon' below." *Clark v. Jeter*, 486 U.S. 456, 460 (1988); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79-80 (1988).

The issues raised in the Petition were presented to neither the Circuit Court of Wood County, Wisconsin nor the Wisconsin Supreme Court, and neither Court decided the issues now raised. For this reason alone, the instant Petition should be denied.

The Wisconsin Supreme Court decided this case as a matter of state law, and did not decide any Constitutional issue. While this is clear from reading Justice Steinmetz's opinion for the Court, it is made even clearer by reading the two concurring opinions, one by Chief Justice Abrahamson (joined by Justices Geske and Bradley), *See Appendix to Petition*, pp. 18a-21a, and the other by Justice Bablitch, *See Appendix to Petition*, p. 27a. Although the Court unanimously decided that on this record, in this case, no Constitutional issues were raised, the concurring Justices staked out positions on Constitutional issues *not* necessary for the decision in this case.

Moreover, neither the pleadings nor briefs submitted in the state courts by Petitioner or the Guardian *ad Litem* raised the Constitutional claims now advanced. No party

to this case has ever previously raised any Equal Protection claim, and the issue specified in Argument "II" of the Petition is raised here in the first instance.

If there was a Constitutional issue raised by the Petitioner in the state courts – and it is not at all clear that any such issue was raised – it was a different issue than is raised here. In the state court the Petitioner suggested that the guardian could exercise the patient's Constitutional right to refuse treatment, *if the guardian could show that the patient herself would have refused treatment under those circumstances.* This is the issue addressed in the trial court brief which is quoted in truncated form at page 51a of the Appendix to the Petition. The problem with this argument was that the state trial court made a factual decision that the evidence did not support the conclusion that Ms. Folz would have made this decision if she was competent. On appeal, the Wisconsin Supreme Court explicitly upheld the factual determination that the evidence *failed* to show that Edna Folz would have wanted to withdraw the feeding tube under these circumstances, *see Appendix to Petition*, pp. 11a-12a.

No party before the Wisconsin Supreme Court suggested, as does Petitioner here, that some provision of the United States Constitution requires that the Guardian have the ability to subjectively decide that the quality of her ward's life had so badly deteriorated that the time had come to cause the disabled person to starve to death. This is an interesting issue, but it is not an issue presented by this case.

No petition for rehearing was filed in the Wisconsin Supreme Court, even though Petitioner tells this Court

that the issues she wants to raise are of "wrenching urgency," *Petition*, at 10. If the issues are so important, they should have been presented to the state court in the first instance. It is unfair to the Wisconsin Supreme Court to raise in this Court issues never presented at the state level.

The Petition should be denied on this basis.

II

NOTHING IN THE CONSTITUTION REQUIRES THAT EVERY STATE ADOPTS THE SAME LEGAL REQUIREMENTS FOR THE DECIDING END-OF-LIFE ISSUES, AND THE MANNER IN WHICH WISCONSIN HAS DEALT WITH THIS ISSUE IS RATIONAL AND, THUS, CONSTITUTIONAL.

A. There Is No Constitutional Requirement That Every State Adopt the Same Law Relating to End-of-Life Issues.

In Argument "I" Petitioner asserts that the decision of the Wisconsin Supreme Court in this case is at odds with decisions "of other state supreme courts and with various state statutes." Respondent demurs to this assertion. Assuming *arguendo* that the assertion is true,[3] that

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[3] However, Respondent is aware of no authority which would allow a Guardian, under the guise of "best interests," to cause suffering to, and the eventual death of, a disabled ward who is not in pain. That is precisely what the Petitioner here proposes to do. Contrary to the assertion of Petitioner, the facts in this case are quite different than in the many cases cited in the Petition, as here the disabled person is not in a persistent vegetative state, and the ward is not now suffering pain or discomfort.

does not give rise to any federal, much less Constitutional, issue. Respondent has studied this part of the Petition carefully, and he fails to find any federal claim even raised, much less a showing that some important Constitutional claim is presented that warrants this Court's plenary consideration.

The short answer to the Petition is that there is no Constitutional requirement that Wisconsin follow the law of any other state when deciding the issues raised by this case. If the Wisconsin Legislature and Wisconsin Supreme Court want to reject the "best interests" approach, they are perfectly within their rights to do so, and nothing in the United States Constitution requires to the contrary.

Petitioner points out that the Maryland and Oregon legislatures have adopted statutes which are inconsistent with how the Wisconsin Supreme Court has interpreted Wisconsin law, and that other state courts around the country have dealt with end-of-life issues differently than did Wisconsin's Highest Court. Such an argument is irrelevant to a grant of certiorari. These are issues of state law, decided by state courts and state legislatures. State probate codes and procedures are not matters of federal law.

The way in which the Wisconsin Supreme Court has decided to deal with surrogate decision-making may be unwise. Indeed, Chief Justice Abrahamson and Justices Geske and Bradley have suggested that in the appropriate case they would reconsider the standard to be applied, *see, Appendix to Petition*, pp. 18a-19a (Abrahamson, C.J., *concurring)*. However, it is not for this Court to decide whether Wisconsin law is wise or desirable, but only whether the decision of the Wisconsin Supreme Court

gives rise to any Constitutional question, *cf. Bowers v. Hardwick*, 478 U.S. 186, 190 (1986). Irrespective of what this Court may believe is wise or prudent policy in this area, "the Constitution does not constitute [this Court] as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws because they do not meet [the Court's] standards of desirable social policy, 'wisdom,' or 'common sense.' " *Plyler v. Doe*, 457 U.S. 202, 242 (1982) (Burger, C.J., dissenting).

The fact that Wisconsin law is different than that of other states gives rise to no federal issue.

B. In Any Event, Wisconsin Law Is Rational and Constitutional.

Conspicuously missing from the Petition is any mention of this Court's most recent statements in this area. During the last week of the last term, this Court decided two "doctor assisted suicide" cases, *Washington v. Glucksberg*, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) and *Vacco v. Quill*, 117 S.Ct. 2293, 138 L.Ed.2d 834 (1997). Surprisingly, neither of these cases is cited anywhere in the Petition.

These cases teach that a state law concerning end-of-life issues, when attacked on either Due Process or Equal Protection grounds, will be upheld if rationally related to a legitimate state interest, *Glucksberg*, 117 S.Ct. at 2271 (Due Process); *Vacco*, 117 S.Ct. at 2297 (Equal Protection). Here Wisconsin's rejection of the "best interests" approach in this case is undoubtedly rationally related to a valid state interest. In footnote 8 of the decision in this case, reprinted at pages 10a and 11a of the Petition, Justice Steinmetz articulated the State's interest: "These

are 1) preserving life, 2) safeguarding the integrity of the medical profession, 3) preventing suicide, and 4) protecting innocent third parties. Preserving life is the most significant state interest at issue here." (*Internal citation omitted*).

The Court went on to explain why the "best interests" approach, while followed in Wisconsin in many situations, is not appropriate when the issue is withdrawing nutrition or hydration.

> [M]ost determinations made in the best interests of a child or an incompetent person are not irreversible; and although a wrong decision may be damaging indeed, there is an opportunity for a certain amount of empiricism in the correction of errors of discretion. Errors of judgment or revisions of decisions by courts and social workers can, in part at least, be rectified when new facts or second thoughts prevail. . . . the decision to withdraw life-sustaining medical treatment is . . . not reversible, because death is not reversible. It is for this reason, then, that we require a guardian to show a clear statement of the ward's desires by a preponderance of the evidence.

Petition, at 11a.

To the best of her doctor's knowledge, Edna Folz is not now suffering pain (T. 34). The Guardian proposes to withdraw the feeding tube, while continuing to provide Ms. Folz with hydration. This will *cause* Ms. Folz suffering. Indeed, her doctor testified that he would give her pain medication should nutrition be withdrawn (T.46). One of the reasons the Wisconsin Supreme Court rejected the Petitioner's request to allow her ward to die was that

this process would cause Ms. Folz pain, *Petition* at 9a. How can this be said to be an "irrational" decision?

Despite the clear statements in *Vacco* and *Glucksberg*, Petitioner does not even attempt to argue that the standard adopted by the Wisconsin Supreme Court is irrational or unrelated to a valid state purpose. Wisconsin has chosen to adopt a bright line test in the cases of people who have neither executed advance directives nor provided convincing evidence of their desires. It is not possible to find this an irrational position. In light of the recent statements in *Vacco* and *Glucksberg*, the Wisconsin Supreme Court's decision implicates no Constitutional violation because it is rationally related to a legitimate state interest. That is all the State must show, and that burden is easily met here. There is simply no basis to review the decision of the Wisconsin Supreme Court.

III

NO EQUAL PROTECTION CLAIM WAS EVER RAISED IN STATE COURT AND, IN ANY EVENT, THERE IS NO COLORABLE EQUAL PROTECTION ISSUE PRESENTED BY THE DECISION OF THE WISCONSIN SUPREME COURT.

A. No Equal Protection Claim Was Ever Raised in the State Courts of Wisconsin.

This issue is raised in this Court for the first time. No Equal Protection claim was ever presented to either the state probate court or the Wisconsin Supreme Court. It should not be heard here in the first instance.

B. The Procedures Established by the Wisconsin Supreme Court Do Not Violate the Equal Protection Clause of the Constitution.

The decision of the Wisconsin Supreme Court does not violate the Equal Protection Clause. According to the Equal Protection Clause of the Fourteenth Amendment, no state shall "deny to any person within its jurisdiction the equal protection of the laws." Petitioner's assertion that the Wisconsin Supreme Court "has ruled that all incompetent persons who are not in a persistent vegetative state simply lose their constitutionally protected liberty interests in making choices about their medical treatment" (*Petition* at 18), is simply wrong. Ms. Folz retains the same Constitutional rights as all citizens.

First, the decision in this case is not about "medical treatment." It is about causing the death of the disabled person by starvation. Under Wisconsin law the guardian can make the full range of medical decisions regarding the ward, so long as those decisions do not cause the ward's death. The Wisconsin Supreme Court was pellucid in distinguishing most forms of treatment from a decision which will result in the death of a disabled person.

Secondly, a competent person only has the "right" to withdraw treatment if he or she expresses that wish. Here Ms. Folz has expressed no such wish. The Equal Protection Clause "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly," *Vacco*, 117 S.Ct. at 2297. If Ms. Folz had executed an advance directive or even made a definite statement to someone regarding her wishes, she would be in the same circumstances as a competent person who is able to

express his or her wishes. Now, however, Ms. Folz is in no different position than a competent person who never expresses a preference or desire to withhold or withdraw treatment. In neither case would a person who has expressed no preference be allowed to starve to death under the guise of "making choices about their medical treatment."

Thirdly, as this Court has recently reminded us: "[M]any [laws] affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law," *Vacco, id., quoting, Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 271-273 (1979). For example, Ms. Folz has the right to vote, to sit on juries, to run for public office, and the right to marry. However, due to her disability, Ms. Folz cannot exercise those rights, and they cannot be exercised by the Guardian. Hence, even if Ms. Folz was a lifelong Republican who never voted for anyone except a Republican in her entire life, Mrs. Spahn cannot now cast her sister's vote. Although Ms. Folz retains exactly the same rights as a non-disabled person, she has lost the ability to exercise some rights by virtue of her disability. If there is a constitutionally protected right to die, and this Court's decisions in *Glucksberg* and *Vacco* bode ill for such a claim, an incompetent cannot exercise that "right," any more than she can exercise her right to vote or marry.

Some rights are personal and cannot be exercised by a guardian. The Wisconsin Supreme Court has decided that one of those rights is the right to withdraw nutrition which will cause the person's painful death. The distinction between incompetent persons who have not, and

cannot, express their wishes, and competent people who can currently express their desires is rationally related to a legitimate state interest and thus meets the Equal Protection test established by this Court in *Vacco*. Wisconsin has a legitimate interest in protecting its citizens from pain and in preserving human life.

The Wisconsin Supreme Court carefully and rationally considered when a guardian cannot exercise rights for the ward which could be exercised by a competent adult. In *In re Guardianship of Eberhardy*, 102 Wis.2d 539, 572, 307 N.W.2d 881 (1981) the Court rejected the request of the parent/guardian of a mentally retarded woman to have the woman sterilized. The Court said:

> While the Constitution would generally mandate a free choice for sui juris adults, a free choice is an empty option for those who cannot exercise it. Moreover, it is by no means certain who should speak for the best interests of the retarded, and those who purport to may have conflicting interests which may well skew the decisions of even the best intentioned. Those who normally would speak for the incompetent parents, guardians, or even social workers may in actuality speak, consciously or unconsciously, in their own interests: diminished worry, convenience, a wish to be relieved of responsibility for close supervision, or frustration at their inability to deal with a most difficult problem. These very considerations may be, indeed, in the interests of the incompetent, but are not necessarily so.

In the instant case, the Wisconsin Supreme Court relied on this language in *Eberhardy* to reject the Guardian's application to cause the death of the disabled person, *see*

Petitioner's Appendix at 8a. This is a rational and reasoned differentiation which passes Equal Protection scrutiny under the test adopted in *Vacco*.

Finally, the Wisconsin Supreme Court found as a matter of state law that "the competent and incompetent person have exactly the same rights," *Appendix*, at 9a. Justice Steinmetz stated:

> Even a competent person cannot order "the withholding or withdrawal of any medication, life-sustaining procedure or feeding tube" if "the withholding or withdrawal will cause the declarant pain or reduce the declarant's comfort" unless the pain or discomfort can be alleviated through further medical means. Wis. Stat. § 154.03(1). *See also* Wis. Stat. § 155.20(1). In the case where withdrawal of life-sustaining medical treatment, including nutrition or hydration, will cause pain or discomfort, then, the competent and incompetent person have exactly the same rights.

Appendix, 9a.

Petitioner wants this Court to address broad Constitutional issues and ignore the specific facts of this case. Those facts are that Ms. Folz has never expressed any desire to have her life terminated in the manner desired by the Guardian, and here – on these facts – the Guardian's proposed action will not only result in Ms. Folz's death, it will cause suffering and discomfort, when none now exists.

While Respondent assumes that the Petitioner is acting in "good faith," this will not be true in every case, and other guardians will have conflicts even when they

are acting in "good faith." Some guardians will have a financial stake in the ward's death, others will be sorely inconvenienced by the lingering illness of a loved one, while for many watching a parent, child, or sibling slowly deteriorate will simply be too emotionally draining. Medical providers and doctors have financial concerns about the cost of and payment for medical care or even the professional frustration of not being able to "cure" a chronically ill patient. In such cases, even a person trying hard to make a good faith decision in the ward's interest can be influenced by these personal concerns, whether they be motivated by greed, personal reputation, or compassion.

The Wisconsin Court decided to retain a bright line whereby withdrawal of nutrition and hydration would be forbidden except when: (1) the disabled person had executed an advance directive or had clearly expressed her wishes on the matter; or (2) the person was in a persistent vegetative state. Unless one of these conditions is met, the guardian cannot cause the death of the ward by withdrawal of nutrition or hydration. It is simply not possible to find that the Wisconsin Supreme Court's decision in this case was other than rationally related to a legitimate state interest.

C. Allowing Guardians to Cause the Death of Their Wards, When the Ward Has Never Expressed a Wish to Die under Such Circumstances, Raises Very Substantial Equal Protection and Due Process Problems.

The Petitioner's position here is that a guardian for a disabled person, whether child or adult, should be able to

cause the death of the disabled person whenever the guardian makes a good faith, but subjective, determination that ward's life is no longer worth living and that it is in the disabled person's "best interest" to die. The Petitioner testified that although Ms. Folz was not capable of making the decision herself (T. 99), in 1988 the Petitioner decided to have the gastrostomy tube inserted because she felt that Ms. Folz could still "enjoy life." She could have fun (T. 100). She enjoyed being around children, and she enjoyed music (T. 99). Now, according to Mrs. Spahn's subjective impression, Ms. Folz has deteriorated to the extent that she does not *seem* to enjoy these things. Thus Petitioner has come to the conclusion that it is in Ms. Folz's "best interest" to die.

Allowing the surrogate decision-maker to decide when it is in the "best interests" of a disabled person to die, when that person has never expressed any desire to have life terminated under the circumstances, raises extraordinary concerns of Due Process and Equal Protection. The rule Petitioner seeks to impose would apply equally to profoundly developmentally disabled children, as well as persons with Alzheimer's disease and other forms of senile dementia. It would apply to people who are terminally ill, chronically, or, perhaps, simply profoundly disabled. Petitioner's position seriously jeopardizes the Constitutional rights of disabled persons.

This is not the case to take up these very serious legal and moral issues. The issue was not raised in state court, there is no evidence on this point in the record, and the Constitutional issue was never squarely decided by the State courts. Indeed, the state courts' decisions in this

case protected the rights of disabled people from premature and involuntary death authorized by surrogates. As important and profound as these issues are, this case is an inappropriate vehicle for consideration of the Equal Protection claims.

IV

THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR CONSIDERATION OF THE CONSTITUTIONAL ISSUES RAISED BY "END-OF-LIFE" POLICIES.

Clearly profound moral, legal, policy, and social issues are raised by end-of-life decision making. However, that is not a basis for granting certiorari in this case. The issues Petitioner wants this Court to decide were not litigated, preserved, or decided in the State Courts of Wisconsin. The facts in this case present an inappropriate vehicle for this Court's plenary consideration, particularly of the broad issues suggested by Petitioner.

There is no question but that this Court will be presented with many opportunities in the future to address every aspect of end-of-life decision-making in cases which have a better record, cases in which the Constitutional claims have been clearly raised, litigated and decided; and cases which present less problematic facts than this case.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 97-437

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BETTY SPAHN, Sister and Guardian of Edna M. Folz,
Petitioner,

v.

MARK WITTMAN, Guardian ad Litem for Edna M. Folz,
Respondent,

On Petition for Writ of Certiorari to the Wisconsin Supreme Court

AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE *AMICUS CURIAE*

The Wisconsin Health Care Association, Inc. ("WHCA"), is a trade association comprised of approximately 245 nursing facilities throughout the State of Wisconsin. It is organized as a non-profit corporation under the laws of the State of Wisconsin.

While the role of the nursing facilities has evolved to include increased rehabilitation of residents for return to a non-institutional setting, a significant segment of the resident population still includes those at the end stages of life. The decision below directly impacts most Wisconsin health care providers. Given the nature of their resident population, Wisconsin nursing facilities are frequently presented with end of life issues, and are therefore in a position to inform the court of interests other than those represented by the parties.

WHCA, through counsel, has received consent of all parties to submit a brief in the matter, and respectfully submits this *amicus curiae* in support of the Petition for Writ of Certiorari.

*** Pursuant to Supreme Court Rule 37.6: This brief was exclusively written, produced and funded by the *amicus curiae*. No parties, or their counsel, have authored or contributed monetarily to the preparation or submission of this brief.**

SUMMARY OF THE ARGUMENT

WHCA does not wish to needlessly burden the Court with the repetition of the petitioner's arguments, but generally seeks to add practical arguments to those legal argument previously presented in the Petition for Writ of Certiorari. More importantly, WHCA intends to demonstrate that the decision below is important to others beyond the parties immediate to that decision. Specifically, that the decision is of importance to the countless residents of Wisconsin who have not clearly and specifically provided instructions regarding life-sustaining treatment, as well as the health care providers who are responsible for the care and provision of treatment to the residents of Wisconsin. This decision is important due to the uncertainty that it has created with respect to: its application to withholding as well as withdrawal of treatment; what is to be considered life-sustaining treatment; and what is to be considered a sufficient prior statement of intentions.

ARGUMENT

I. THE DECISION BELOW IMPACTS AND IS OF IMPORTANCE TO OTHERS BEYOND THE IMMEDIATE PARTIES DUE TO THE UNCERTAINTY IT HAS CREATED.

It is self-evident that any decision of the Wisconsin Supreme Court involving the right of individuals to withhold or withdraw life-sustaining medical treatment has the potential for impacting every Wisconsin resident, as all persons must ultimately face end of life issues. The statement of the court below that, if a person is not in a persistent vegetative state,"as a matter of law, it is not in the best interest of the ward to withdraw life-sustaining treatment, including a feeding tube, unless the ward has executed an advanced directive or other clear statement indicating his or her desires" *In re Edna M.F. v. Eisenberg.*, 210 Wis.2d 558,568, 563 N.W.2d 485,489-90 (Wis. 1997) potentially impacts every Wisconsin citizen who has not executed an advance directive or has failed to adequately make a clear statement regarding his or her desires with respect to the withholding or withdrawal of life-sustaining treatment.

For the court to state that absent a diagnosis of persistent vegetative state, it can *never* be in the best interest to withdraw life-sustaining treatment in the absence of sufficiently clear prior intentions, directly impacts all residents who would wish to avoid life sustaining treatment in certain circumstances, yet

have failed to properly convey such intentions and desires. The true number of affected individuals cannot be determined because, as the Wisconsin Supreme Court previously so articulately summarized:

> Relatively few individuals provide explicit written or oral instructions concerning their treatment preferences should they become incompetent. The reasons for which are undoubtedly myriad: ignorance, superstition, carelessness, sloth, procrastination or the simple refusal to believe it could happen to oneself. This failure to act is not a decision to accept all treatment, nor should society's increasing ability to prolong the dying process make it one.

In the Matter of Guardianship of L.W., 167 Wis.2d 53,74-75, 482 N.W.2d 60,68 (footnote omitted)(Wis. 1992).

While the decision below is clearly important to individual Wisconsin residents beyond parties involved, the health care providers who are responsible for their care, treatment, and abiding by the health care decisions are also significantly impacted by this decision. WHCA cannot speak on behalf of all Wisconsin health care providers, but it can stress the importance of the decision below as it pertains to nursing facilities within Wisconsin.

Nursing facilities are regularly presented decisions involving life-sustaining medical treatment. The decision below significantly impacts the everyday provision of care for the large number of incompetent residents within their facilities. This is particularly true when read in conjunction with the court's prior decision of *In the Matter of Guardianship of L.W.*, 167 Wis.2d 53, 482 N.W.2d 60 (Wis. 1992) which affirmed a trial court's order that a guardian has the authority to withhold or withdraw life-sustaining medical treatment, including artificial nutrition and hydration, on behalf of a ward who is in a persistent vegetative state, where it has been determined in good faith that doing so would be in the ward's best interests.

While it was anticipated that the decision below would clarify and provide facilities and other providers with guidance as to guardians' and other decisionmakers' authority, it has unfortunately created great confusion and concern. This confusion and uncertainty results as much from what the court held, as what remains unstated.

The foremost concern of the nursing facilities is that the patients in their care not be subjected to unwanted medical treatment, and that the ability of a guardian to consent to or refuse such treatment on their behalf should not depend solely upon whether an incompetent patient is in a persistent vegetative state or not. Coupled with this concern is that providers now face great uncertainty as to respecting a guardian's decision given the differing authority that guardians have, based on the ward's

medical classification. This uncertainty is the result of several components of the decision below.

Unlike the holding of *In re L.W.* that specifically authorized the withdrawal *or withholding* of life-sustaining treatment, the holding in the decision below refers only to the "withdrawal" of treatment. While the decision below indicated that it reaffirmed the holding of *In re L.W.*, neither case explicitly determined whether the court views withholding different from withdrawal. Courts in other jurisdictions have often relied upon a premise that there should be no legal distinction made between the withholding and withdrawal of treatment. *See, e.g., In re Conroy,* 98 N.J. 321,369-370, 486 A.2d 1209,1234 (1985). One is left to only presume that the decision below can be read to indicate that a guardian cannot also withhold life-sustaining treatment in the absence of an advance directive or other clear statement of the ward's desires. Left unstated, however, providers and guardians must wrestle with the uncertainty as to whether the decision below should be equally applied to the withholding of treatment.

A second area of concern resulting from the decision below lies with what Wisconsin guardians and providers are to consider to constitute "life-sustaining treatment." While the decision below involved the withdrawal of a life-sustaining feeding tube, the holding makes the blanket prohibition of the withholding of life-sustaining treatment, *See In re Edna M.F.,* 210 Wis.2d at 573, 486 N.W.2d at 492, leaving undefined as to what

treatments are to be considered life-sustaining. While some guidance can be found within the Wisconsin "living will" statute, which contains a definition of "Life-sustaining procedure,"[1] its utility is unclear given that the decision below did not reference or discuss this definition.

Given the court's blanket prohibition that the withdrawal (and presumably withholding) of life-sustaining treatment cannot be in the best interests in the absence of sufficient prior indication, guardians and health care providers are now faced with the prospect of imposing or continuing any and all treatments that might possibly constitute life-sustaining treatment when an incompetent patient has not provided specific and sufficient evidence of their desires as to such treatment.

As an illustration, cardiopulmonary resuscitation (CPR) may be considered life-sustaining treatment for some individuals, however, survival rates for unwitnessed arrests within nursing homes and overall survival rates for elderly individuals are

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[1] "Life-sustaining procedure" means any medical procedure or intervention that, in the judgment of the attending physician, would serve only to prolong the dying process but not avert death when applied to a qualified patient. "Life-sustaining procedure" includes assistance in respiration, artificial maintenance of blood pressure and heart rate, blood transfusion, kidney dialysis and other similar procedures, but does not include:

(a) The alleviation of pain by administering medication or by performing any medical procedure.

(b) The provision of nutrition or hydration.

Wis. Stats. § 154.01(5).

extremely low[2]. Yet it can be argued that the decision below would prohibit a guardian, in the absence of a prior indication, from consenting to a do-not-resuscitate order. Upon cardiac or pulmonary arrest, the ward may needlessly suffer the traumatic intervention that at best would be futile, at worse could cause suffering with little or no hope of restoring life beyond a comatose or vegetative state. Few would argue that this would be in the best interests of an individual, however, the decision below would appear to prohibit a guardian from weighing the benefits of CPR against the near futility of such treatment.

The above example may be at the extreme of a literal interpretation of the decision below, however, it illustrates the uncertainty faced by providers and guardians. It is difficult to understand why if this hypothetical patient were in a persistent vegetative state, under *In re L.W.*, the guardian would be permitted to apply objective standards in making the determination as to whether such treatment is in the patient's best interests.

Health care providers and guardians, without additional clarification, are at a loss as to which treatments can or cannot

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[2] In a study of 503 consecutive patients aged 70 and over who received CPR, only 3.9% survived to hospital discharge. Only 1 of 116 of patients with unwitnessed arrests survived. Donald Murphy, M.D. et. al., *Outcomes of Cardiopulmonary Resuscitation in the Elderly*, 111 ANNALS INTERNL. MED., 199-205 (1989); *See also*, Sissay Awoke, M.D. et. al., *Outcomes of Skilled Cardiopulmonary Resuscitation in a Long-Term-Care Facility: Futile Therapy?*, 40 J. AM. GERIATR. SOC'Y, 593-595 (1992).

be withheld or withdrawn in the absence of prior explicit indications from the patient. This confusion and uncertainty is the specific reason that WHCA submits this *amicus curiae*. While members may hold differing opinions as to the result of the decision below, there is general agreement that the status quo is untenable.

It is understandable, laudable, and appreciated that the court below chose to error on the side of preservation of life, and part of the difficulty with this decision rests on the fact that the court was presented, and therefore forced to grapple with, the issue of the removal of a feeding tube. While ethicists and courts may attempt to not distinguish between artificial feeding from other life-sustaining treatment *See Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 288-289, 110 S.Ct. 2841, 2857 (1990) (O'Conner, J., concurring); *In re L.W.*, 167 Wis.2d at 70, 482 N.W.2d at 66; *In re Conroy,* 98 N.J. at 373, 486 A.2d at 1236, no matter how objectively one attempts to view such removal as equal to withholding or withdrawal of any treatment, it is nearly impossible to shed the "emotional symbolism" of food. *See Barber v. Superior Court,* 147 Cal.App.3d 1006,1016, 195 Cal.Rptr. 484,490 (Ct.App. 1983).

This notwithstanding, providers and guardians still remain in a situation where they are precluded from analyzing whether treatment is truly appropriate. This may dictate that all treatments that could be considered remotely life-sustaining must be imposed out of uncertainty as to what is truly life-

sustaining and what evidence of a prior statement is sufficient to overcome the presumption that such treatment must be provided to the ward.

Such uncertainty, compounded by the difficulty of determining what is to be considered sufficient indications of a prior clear statement of an individual's desires, has raised provider concerns above and beyond the desire to do what is best for the residents for whom they are entrusted to provide care. With the only guidance provided is that a thirty-year-old statement of "I would rather die of cancer than lose my mind" is insufficient, *See Edna M.F.* 210 Wis.2d at 572, 563 N.W.2d at 491, a determination as to what is sufficient is problematic and raises concerns as to potential civil and criminal exposure.

There are civil concerns associated with continuing or imposing treatment in spite of a guardian's decision to the contrary, due to concern that the purported prior statements are insufficient to overcome the judicial presumption created by the decision below. While providers would not be without solid defense arguments, litigation alleging battery, infliction of emotional distress or similar claims have been brought against providers. *See, e.g., Estate of Leach v. Shapiro,* 13 Ohio App.3d 393, 469 N.E.2d 1047 (Ohio Ct.App. 1984). There are also liability concerns associated with abiding by a guardian's decision to withhold or withdraw treatment. Family members who did not fully agree with the decision of the guardian may attempt to hold providers liable for such actions by asserting that the

provider did so without sufficient evidence of the ward's desires.

In addition, providers have concerns that the uncertainties in this area may expose them to criminal sanctions for abiding by a guardian's decision to withhold or withdraw treatment. While most prosecutions have not ultimately resulted in the imposition of criminal liability *See, e.g., Barber v. Superior Court,* 147 Cal.App.3d 1006, 195 Cal.Rptr. 484 (Ct.App. 1983) the concern cannot be discounted that a zealous or aspiring district attorney will attempt to prosecute a provider who acted on what was believed to be sufficient evidence of a ward's desire.

Civil and criminal actions, while rare, remain a legitimate concern in light of the uncertainties created by the decision below. While liability concerns are generally theoretical in so much as there appears general consensus that so long as proper procedures are followed, most, if not all, liability ceases to exists. However, the uncertainties discussed above as well as uncertainties as to proper procedures for making determinations regarding the sufficiency of an individual statement makes it difficult for providers to dispel their liability concerns. Such uncertainties are compounded by the separate standards that guardians and providers are required to apply to incompetents who are in a persistent vegetative state and those who are not.

II. THE DECISION BELOW CONFLICTS WITH OTHER STATE SUPREME COURTS AND WITH OTHER STATE STATUTES.

As adequately and succinctly detailed in Petitioner's Writ, the Wisconsin Supreme Court's decision in this matter is in conflict with that of several other state supreme court decisions as well as in conflict with several state's statutes in this area [Petitioner for Writ of Certiorari, pp.10-17]. Without repeating such arguments, WHCA would merely contribute a brief and general comment regarding this argument.

One may argue that differing interpretations of the best interest standard and its application is entirely consistent with and envisioned under *Cruzan*, wherein this Court stated that it is constitutionally permissible for the State of Missouri to choose the rule of decision which it did. However, the practical effect of permitting Wisconsin to depart from other states in the interpretation of the "best interests" application, places individuals and health care providers in a difficult position.

Through the long line of caselaw in the area in what can generally be described as the "right to die" decisions, the concept of "best interests" has emerged as a fundamental principle in this area of the law. However, several jurisdictions have interpreted this concept, and the factors that may or may not be considered in its application, with varying standards. A concept that so permeates this area of the law should have some

consistency in application.

Whether an individual must endure treatment that he or she would otherwise refuse if able, should not hinge upon the particular state that the person happens to become incompetent. Many elderly Wisconsin residents maintain separate residences in other states in order to avoid the harsh Wisconsin winters. These individuals and others in our modern mobile society should not be dependent upon which side of a particular state's border-line they happen to fall when they become ill or are involved in a debilitating accident. This Court is in a position to provide guidance and harmonize the differing application of a standard so crucial as that of the "best interests" standard.

CONCLUSION

If all nursing facility patients were competent to make their own medical decisions, or if all Wisconsin residents were to take the time to execute an advance directive detailing their desires with respect to life sustaining treatment, the decision below would be of little significance to Wisconsin nursing facilities. However, a significant portion of Wisconsin nursing home patients are not competent, and the utilization of advance directives among U.S. and Wisconsin population is surprising low.

WHCA is by no means requesting that guardians be granted unfettered discretion to withhold or withdraw treatment, but rather, that they not be judicially precluded from making a reasoned analysis as to the appropriateness of the provision of

medical treatment. That the guardian, in making the best interests determination, be able to apply the objective factors such as those previously enunciated by the court below including:

> The degree of humiliation, dependence, and loss of dignity probably resulting from the condition and treatment; the life expectancy and prognosis for recovery with and without treatment; the various treatment options; and the risks, side effects, and benefits of each of those options.

In re L.W. 167 Wis.2d at 86, 482 N.W.2d at 72 (citing In re Conroy, 98 N.J. 321,363-364, 486 A.2d 1209,1231 (1985)) The holding of the decision below, coupled with the uncertainty as to what is to constitute life sustaining treatment, may require that guardians authorize any and all treatments that may be of remote benefit, without allowing the guardian to weigh the appropriate factors such as those listed above.

For all the forgoing reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

BETTY SPAHN, Guardian of Edna M. Folz,
Petitioner,

v.

MARK WITTMAN, Guardian ad Litem for Edna M. Folz,
and HOWARD B. EISENBERG,
Respondents.

On Petition for Writ of Certiorari to the Wisconsin Supreme Court

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PETITIONER'S REPLY BRIEF

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ARGUMENT

The decision of the Wisconsin Supreme Court in Edna Folz's case warrants review by this Court.

The Respondent argues that this Court should deny review for three reasons: (1) this case presents no federal issue; (2) the Constitutional issues raised in the Petition were not presented below; and (3) there is no colorable equal protection issue presented by the decision of the Wisconsin Supreme Court. None of these arguments supports a decision to deny certiorari.

I. THE WISCONSIN SUPREME COURT DECISION AND CONFLICTING HIGH COURT TREATMENT TERMINATION DECISIONS FROM OTHER STATES ARE GROUNDED IN FEDERAL LAW, AND THIS COURT THEREFORE HAS JURISDICTION IN THIS CASE.

The Respondent argues that no federal issue is raised by the Wisconsin Supreme Court's sweeping holding that "as a matter of law, it is not in the best interests of the ward to withdraw life-sustaining treatment, including a feeding tube, unless the ward has executed an advance directive or other statement clearly indicating his or her desires" or by the conflicting law in other states. This argument clearly misconstrues the Wisconsin Supreme Court ruling and the conflicting law discussed in the Petition, and misunderstands the test for United States Supreme Court jurisdiction established by *Michigan v. Long*, 463 U.S. 1032 (1983).

In *Michigan v. Long*, this Court adopted the "plain statement" rule for determining whether it has jurisdiction to review a state court decision: the Court will assume state courts have acted under federal law unless a plain statement to the contrary is made. *Id.* at 1040-41. The state law ground must be spelled out; it must be "clear from the face of the opinion." *Id.* at 1041. A state court decision that does not expressly set out its state grounds or which "appears to rest . . . on grounds *interwoven*

with federal law" provides this Court with jurisdiction. O'Connor, "Our Judicial Federalism," 35 *Case W. Res. L. Rev.* 1, 8 (1984) (*emphasis supplied*). The purpose of this rule is to assure uniformity in the recognition of federal rights among the state courts. *Id.* at 6-8.

The Wisconsin Supreme Court did not at any point in its opinion suggest that its decision was based on state law. To the contrary, throughout its opinion the Wisconsin court repeatedly treated federal and state rights to direct one's medical treatment course as one set of individual rights that it balanced against the state's interest in preserving life. For example, expressly relying on the framework it used in *In the Matter of the Guardianship of L.W.*, 167 Wis. 2d 53, 482 N.W.2d 60 (1992) for its decision in this case, the Wisconsin court reiterated that, " 'an individual's right to refuse unwanted medical treatment emanates from the common law right of self-determination and informed consent, the personal liberties protected by the Fourteenth Amendment, and from the guarantee of liberty in Article I, Section I of the Wisconsin Constitution.' " Appen. at 6a (*citations omitted*). The Wisconsin court again highlighted the federal law foundation for its analysis by stating that "this court concluded in *L.W.* 'that an incompetent individual in a persistent vegetative state has a constitutionally protected right to refuse unwanted medical treatment, including artificial nutrition and hydration.' " (*citations omitted*). Appen. at 7a.

By its failure to set out separate state grounds, and by its acknowledgment of federal *and* state law bases for treatment decision making rights, the Wisconsin Supreme Court provided this Court with jurisdiction to review its decision. *Michigan*, 463 U.S. at 1040-41. Conspicuously, the Respondent fails to address the *L.W.* analysis relied upon by the Wisconsin court below. Respondent also fails to acknowledge that conflicting state supreme court opinions discussed in the Petition similarly ground treatment decision making rights in both state *and* federal law. Resolution of this conflict of authority among

jurisdictions regarding the protection of incompetent persons' constitutional interests to be free from unwanted treatment warrants review by this Court. *See* U.S. Sup. Ct. R. 10.

II. THE CONSTITUTIONAL ISSUES RAISED IN THE PETITION WERE PRESSED BY PETITIONER IN THE COURTS BELOW.

Petitioner raised the constitutional issues now presented in the Petition for Certiorari before the Wisconsin courts with sufficient clarity to permit this Court to hear the case. Respondent argues that the Wisconsin Supreme Court ignored Petitioner's constitutional arguments in rendering its decision in this case. However, this Court has recognized that the "pressed *or* passed upon" rule is disjunctive, and that the Court is free to consider an issue pressed by the litigants below, even if the state court declined to address the issue. *Illinois v. Gates*, 426 U.S. 218, 216 n.1 (1983).

Petitioner argues in her Petition and repeatedly argued below that this case presents issues of fundamental, personal and constitutional liberty rights. Appen. 53a-55a. Petitioner specifically drew the Wisconsin Supreme Court's attention to the seminal Wisconsin case addressing federal and state constitutionally protected liberties in a medical treatment decision making context. Appen. at 53a (*citing L.W.*, 167 Wis. 2d at 73, 482 N.W.2d at 67 (1992)).

Petitioner's brief to the Wisconsin Court of Appeals, which was allowed to stand as briefing before the Wisconsin Supreme Court, also raised the equal protection issue now advanced on Petition for Certiorari. Petitioner argued that creating a distinction between incompetent individuals in a persistent vegetative state and those not in a persistent vegetative state was "inconsistent with the Supreme Court's earlier conclusion '. . . that the right to refuse all unwanted life-sustaining medical treatment extends to incompetent as well as competent individuals . . .'" Appen. 53a (*quoting L.W.*, 167 Wis. 2d at 73, 482 N.W.2d at 67).

Furthermore, in Petitioner's circuit court brief in Wisconsin, Petitioner raised the equal protection issue and cited the court to the Fourteenth Amendment to the United States Constitution—the same constitutional provision at issue in the Petition for Certiorari:

> 'We find no reason to differentiate between the rights of the competent and incompetent.'
>
> Can it be said then, reasonably or constitutionally, that this right 'extends' from competent individuals only to those incompetent individuals in a persistent vegetative state and somehow excludes all other incompetent individuals? The answer must be 'no.'

Appen. at 51a (*quoting L.W.*, 167 Wis. 2d at 77, 482 N.W.2d at 69).

The issue on certiorari was presented to the courts below. The arguments raised in the Petition constitute nothing more than new arguments in support of Petitioner's original constitutional claim. This Court's rule is that "once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992) (citations omitted); *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995). In *Lebron*, the Court reaffirmed the rule in *Yee* that a petitioner is entitled to raise additional arguments in support of its original claims. In *Lebron*, petitioner argued below that Amtrak was subject to constitutional requirements because it was closely connected with federal entities. Petitioner specifically disavowed before the district court and the court of appeals that Amtrak was itself a federal entity. Nonetheless, this Court exercised its discretion to review the issue of whether Amtrak was a federal entity, holding that this issue was simply a new argument in support of petitioner's original claim that Amtrak was subject to constitutional requirements. *Id.*

Similarly, in this case, Respondent concedes that Petitioner raised a federal constitutional challenge to the

Wisconsin Circuit Court's decision before the Wisconsin Supreme Court. Respondent myopically frames the issue raised as whether "the guardian could exercise a patient's constitutional right to refuse treatment." Respondent's Brief in Opposition to Petition for Certiorari at 4. Petitioner's claims below were actually much more expansive than Respondent is willing to acknowledge. Even under Respondent's limited construction of Petitioner's constitutional argument, however, the issues raised in the Petition are simply new arguments in support of her original claim that distinguishing between persistently vegetative and non-persistently vegetative incompetents improperly impacts fundamental rights protected by the United States Constitution.

Finally, this Court has suggested that the "pressed or passed upon below" rule is merely a prudential restriction, rather than a jurisdictional limit on the Court's power of review. *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Vachon v. New Hampshire*, 414 U.S. 478, 479, n.3 (1974).[1] Because this case presents highly significant and time-sensitive issues, this Court should exercise its discretion and accept certiorari.

III. THE WISCONSIN SUPREME COURT DECISION VIOLATES THE EQUAL PROTECTION CLAUSE.

The Respondent also argues that even if raised below, no colorable equal protection issue is presented by the Wisconsin Supreme Court decision. He supports this argument first through the inflammatory statement that the decision in this case is not about liberty interests to refuse unwanted medical treatment but about "causing the death of the disabled person by starvation"—a statement which is reiterated repeatedly throughout his Brief. This characterization of the case at hand is false and proffered

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[1] This Court has declined to definitively state whether the "pressed or passed upon below" rule is prudential or jurisdictional. *Gates*, 462 U.S. at 222.

in an unproductive attempt to avert careful analysis of the important legal issues involved.

This Court has carefully distinguished the removal of life-sustaining treatment from actions which intentionally "cause" death. *See Vacco v. Quill*, —— U.S. ——, 117 S. Ct. 2293, 2298 (1997) ("when a patient refuses life sustaining medical treatment he dies from an underlying fatal disease or pathology") ("when feeding tube is removed, death 'result[s] . . . from [the patient's] underlying medical condition' ") (modifications in original, internal citations omitted). This "distinction comports with fundamental legal principles of causation and intent. . . . [as] the law distinguishes actions taken 'because of' a given end from actions taken 'in spite of' their intended but foreseen consequences." *Id.* 117 S. Ct. at 2298-2299. In addition, as discussed in the *amicus curiae* brief filed by the Wisconsin Health Care Association, Inc. ("WHCA"), the Wisconsin court's holding imposes a blanket prohibition against the withholding or withdrawal of *all* life-sustaining treatment, not just artificial nutrition. *See* WHCA Amicus Br. at 6-8.

The Respondent then goes on to use this Court's recent decisions in *Washington v. Glucksberg*, —— U.S. ——, 117 S. Ct. 2258 (1997) and *Vacco, supra,* to argue that there is no equal protection violation because the Wisconsin court's ruling, which deprives incompetent individuals who never expressed treatment preferences of their right to be free of unwanted medical treatment, need only be rationally related to the state's interest in preserving life. By miscasting the issue in this case—i.e., the right to be free of unwanted medical treatment—as being the same as the issue involved in *Glucksberg* and *Vacco*—i.e., assisted suicide—the Respondent attempts to nullify the fundamental statute of Edna's liberty interests and mischaracterizes the attendant burden which countervailing state interests must meet in order to overcome such interests.

This Court clarified in *Vacco* and *Glucksberg* that the "right" to assisted suicide is not a fundamental liberty interest protected by the Due Process Clause. *Vacco*, 117 S. Ct. at 2297; *Glucksberg*, 117 S. Ct. at 2271. In both holdings, however, the Court clearly differentiated assisted suicide from the right to refuse or withdraw life-sustaining treatment. In *Vacco*, the Court said: "we think the distinction between assisting suicide and withdrawing life-sustaining treatment, a distinction widely recognized and endorsed in the medical profession and in our legal traditions, is both important and logical," *Vacco*, 117 S. Ct. at 2298. In *Glucksberg*, the Court noted its assumption in *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990), that there is "a constitutionally protected right to refuse lifesaving hydration and nutrition[,]" and then went on to say: "we certainly gave no intimation that the right to refuse unwanted medical treatment could be somehow transmuted into a right to assistance in committing suicide. . . . Indeed the two acts are widely and reasonably regarded as quite distinct." *Glucksberg*, 117 S. Ct. at 2270. *Unlike* assisted suicide, this Court explained, the right to refuse unwanted medical treatment is "so rooted in our history, tradition, and practice as to require special protection under the Fourteenth Amendment." *Glucksberg*, 117 S. Ct. at 2268 n.17, and 2271.[2]

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[2] *See also* Justice Brennan's dissent in *Cruzan*: "[I]f a competent person has a liberty interest to be free of unwanted medical treatment, as both the majority and Justice O'Connor concede, it must be fundamental. 'We are dealing here with [a decision] which involves one of the basic civil rights of man.' *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S. Ct. 1110, 1113, 86 L. Ed. 1655 (1942) (invalidating a statute authorizing sterilization of certain felons). Whatever other liberties protected by the Due Process Clause are fundamental, 'those liberties that are deeply rooted in this Nation's history and tradition are among them.' *Bowers v. Harwick*, 478 U.S. 186, 192, 106 S. Ct. 2841, 2844, 92 L. Ed. 140 (1986) (*quoting Moore v. East Cleveland, supra*, 431 U.S. at 503, 97 S. Ct. at 1938 (plurality opinion) . . . The right to be free from medical attention without consent, to determine what shall be done with one's own body *is* deeply rooted in this Nation's

Whenever a fundamental right of a citizen is at stake, classification in state court action that impinges on it is subject to "strict scrutiny," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and can be upheld only if it serves a compelling state interest, *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). *See also Glucksberg*, 117 S. Ct. at 2268 ("the Fourteenth Amendment 'forbids the government to infringe . . . "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest' ") (internal citations omitted). The Wisconsin Supreme Court holding fails this test by allowing the withdrawal of life-sustaining treatment from incompetent persons in a persistent vegetative state *absent* the existence of a clear prior treatment directive, but prohibiting such withdrawal for all other incompetent persons *unless* there is a clear prior treatment directive.

In Wisconsin, all seriously ill children and incompetent developmentally disabled adults, as well as the vast majority of previously competent seriously ill adults who have advance directives, must be subjected to any and all available medical interventions regardless of the pain they suffer or the burdens and/or benefits of such treatment. Yet, as noted by the New Jersey Supreme Court, "the State's interest [in preserving life] weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims. Ultimately there comes a point at which the individual's rights overcome the state interest." *In re Quinlan*, 70 N.J. 10, 41, 355 A.2d 647, 664 (1976), *cert. denied* 429 U.S. 922 (1976). Under current Wisconsin law, however, invasive treatment for most of the incompetent individuals who reach this point must continue foreover.[3]

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traditions, as the majority acknowledges." *Cruzan*, 110 S. Ct. at 2865 (Brennan, J., dissenting).

[3] The Respondent misstates or simply misunderstands the impact of the Wisconsin court's ruling when he admonishes the Petitioner

Finally, the Respondent claims that there is no equal protection violation because non persistently vegetative incompetents *maintain* the right to refuse unwanted medical treatment; they simply have lost the ability to exercise it, and their guardians should be precluded from doing so, on their behalf, because some guardians could have conflicting interests.[4] It is simply preposterous to argue that an individual's "rights" to refuse treatment are maintained in circumstances where exercise of those rights is impossible. As this Court noted: "The law must often adjust the manner in which it affords 'rights' to those whose status renders them unable to exercise choice freely and rationally. Children, the insane, and those who are irreversibly ill with loss of brain function, for instance, all retain rights to be sure, but often such rights are only meaningful as they are exercised by agents acting with the best interest of their principals in mind." *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2693, n.23 (1988) (plurality opinion).

This Court's directive in *Thompson* was previously applied by the 7th Circuit in the context of medical treatment decisions:

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for ignoring the specific facts of this case, including whether Edna is suffering pain, can enjoy life, is chronically or terminally ill, and/or is faithful to the tenets of her religion. The Wisconsin court's decision *precludes* the consideration of any such factors in making life-sustaining treatment decisions for a non-persistently vegetative incompetent who does not have a clear advance directive. The Wisconsin court has determined that regardless of the facts, "as a matter of law, it is not in the best interests of the ward to withdraw life sustaining treatment." Appen. at 9a.

[4] The Respondent recognizes that the Petitioner has no such conflict but argues that a total ban on the exercise of discretion should nonetheless be imposed on guardians in all cases. This approach applies the broadest brush instead of utilizing criteria and safeguards which would provide the most narrowly tailored restriction on incompetents' liberty interests, such as judicial intervention in cases where a conflict may exist.

> [A] patient's incompetency should not deprive him of a liberty interest in 'making' treatment decisions. Such a rule would have the absurd result of granting less protection to those incompetent patients who are in greater need of it. It is of course evident that a patient who is by definition incompetent will not really be able to make these decisions on his own. But this simply means that someone else acting in the patient's best interests will have to make the decision for him.

Lojuk v. Quandt, 706 F.2d 1456, 1466 (7th Cir. 1983), *cert. denied*, 474 U.S. 1067 (1986).

By prohibiting the Petitioner from exercising Edna's liberty interests on her behalf simply because she is not in a persistent vegetative state, the Wisconsin Supreme Court's ruling violates the Fourteenth Amendment.

CONCLUSION

This Court has jurisdiction over this case. This case raises questions of critical national importance. The decision below is wrong and in conflict with decisions of courts in other states. Accordingly, the Petition should be granted.

Respectfully submitted,

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